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**The Relationship Between Human Rights and Peace in Ethnically Divided, Post-Conflict Societies: Theory and Practice**

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**Thesis Title: ‘The Relationship Between Human Rights and Peace in  
Ethnically Divided, Post-Conflict Societies: Theory and Practice’**

Nasia Hadjigeorgiou

Submitted for a PhD in Law, King’s College London

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## **Abstract**

This thesis critically examines the relationship between the protection of human rights and peace in ethnically divided, post conflict societies. It seeks to achieve this in two ways: on the one hand, it undertakes a theoretical analysis of the two key terms and on the other, it compares how protecting the rights to property and vote has affected peacebuilding efforts in Bosnia and Herzegovina, South Africa and Cyprus. Peace, as defined in the thesis, consists of three elements – security, justice and reconciliation; these sometimes reinforce and others contradict with each other. Theoretical arguments and real-life examples from the three case studies that confirm the existence of a positive relationship between human rights and peace are abundant. At the same time however, it is possible that the protection of human rights can also undermine peacebuilding efforts, whether inadvertently or through their explicit demand. Human rights can, for example, promote security to the detriment of justice or reconciliation, thus negatively affecting the peacebuilding operation as a whole.

In addition to the existence of a positive *and* negative relationship, it is also often the case that human rights are not connected to peace at all. This is particularly because in order for peace to be built, it is necessary to induce in the ethnically divided, post-conflict society, legal, political, socio-economic and psychological changes. While however, human rights can make important contributions to the legal changes that have to take place, they are less effective in inducing the rest. This more nuanced understanding of the relationship between human rights and peace, calls for the enrichment of the liberal peacebuilding recipe that has human rights at its centrepiece. Policy makers should adopt an alternative strategy, which while valuing human rights, also addresses their limitations by supplementing them with other peacebuilding tools and mechanisms as well.

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## **Abbreviations**

ANC – African National Congress

Article 1-1 – Article 1 of Protocol No. 1 of the European Convention on Human Rights (the right to property)

Article 3-1 – Article 3 of Protocol No. 1 of the European Convention on Human Rights (the right to vote)

BEE – Black Economic Empowerment

BiH – Bosnia and Herzegovina

BiH CC – Bosnia and Herzegovina Constitutional Court

Brahimi Report - Report of the Panel on United Nations Peace Operations

CCMC – Cyprus Community Media Centre

CMP – Committee on Missing Persons

CODESA – Convention for a Democratic South Africa

CRLR – Commission on Restitution of Land Rights

CSCE - Commission on Security and Cooperation in Europe

CUP – Cambridge University Press

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EFOR – European Force (in Bosnia and Herzegovina)

EU – European Union

FBiH – Federation of Bosnia and Herzegovina

GC – Greek Cypriot(s)

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic Social and Cultural Rights

ICTY – International Criminal Tribunal for the Former Yugoslavia

IPC – Immovable Property Commission

NATO – North Atlantic Treaty Organisation

NP – National Party

OSCE – Organisation for Security and Cooperation in Europe

OUP – Oxford University Press

PLIP – Property Legislation Implementation Plan



PRIO – Peace Research Institute Oslo  
ROC – Republic of Cyprus  
SA – South Africa/ South African(s)  
SFOR – Stabilization Force (in Bosnia and Herzegovina)  
TC – Turkish Cypriot(s)  
TRC – Truth and Reconciliation Commission  
‘TRNC’ – ‘Turkish Republic of Northern Cyprus’  
UNFICYP – United Nations Peacekeeping Force in Cyprus  
UDHR – Universal Declaration of Human Rights  
UN – United Nations  
UNDP – United Nations Development Programme  
UNESCO – United Nations Educational Scientific and Cultural Organisation  
UNGAR – United Nations General Assembly Resolution  
UNHRC – United Nations High Commissioner for Refugees  
UNODC – United Nations Office on Drugs and Crime  
UNSCR – United Nations Security Council Resolution

## **Chapter 1: Introduction**

### **1. Introduction**

The promise and expectation in ethnically divided, post-conflict societies is that the protection of human rights is necessary – and sometimes even sufficient – for the building of peace in the country. Yet, despite the UN officials’ unwavering conviction of this, it is never made clear precisely in what way human rights can achieve such an objective. Furthermore, if one attempts to explain this seemingly uncontroversial expectation, she is likely to quickly stumble on a rather confusing and uncomfortable truth: attempts to protect human rights have not in fact always, or even often, resulted in peaceful societies. Therefore, this thesis challenges the expectation that peace and human rights are *only* positively connected and concludes instead that their relationship is more nuanced than originally assumed. In particular, it argues that there are ample theoretical arguments and real-life examples confirming the positive connections between the two terms. At the same time however, it is often the case that human rights protections undermine the success of peacebuilding operations or that the latter are more effectively promoted through mechanisms and tools that are not connected to the former at all. If one only focuses on the positive connections and ignores the other two facets of the relationship in question, she runs the risk of overestimating the peacebuilding potential of human rights.

Developing our understanding of how the two terms connect is both necessary and important because of the increasing use of human rights as peacebuilding tools in different divided societies around the world. Moreover, it is timely since the political negotiations for the reunification of Cyprus – the divided society that was the inspiration for this thesis – are gradually coming to a close.<sup>1</sup> If the conclusions of this

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<sup>1</sup> The UN Secretary-General’s Special Adviser on Cyprus, Mr. Espen Barth Eide, has warned the political leaders on several occasions in the last months that this round of negotiations is likely to be the last one; the implication is that the two sides will either reach a peace agreement soon or the island will be partitioned. This theme, that the negotiations are coming to a close, has also been picked up by academics and non-governmental organisations working on the Cypriot issue. (See for example, James Ker-Lindsay, *Resolving Cyprus: New Approaches to Conflict Resolution* (London: I.B. Tauris & Co,

analysis are taken seriously, peacebuilders in Cyprus and elsewhere would do well to adopt a multifaceted approach towards human rights. They should push for their protection where this is likely to contribute to peace in the ethnically divided, post-conflict society, but acknowledging their dangers and limitations, they should, on other occasions, spend their limited resources in other ways.<sup>2</sup> It is therefore necessary to enrich the dominant peacebuilding strategy, which at the moment relies heavily on the protection of human rights, by supplementing it with additional peacebuilding tools and methods as well.

## **2. The central question**

The central concern of this thesis is to clarify the relationship that exists between the protection of human rights and the building of peace in ethnically divided, post-conflict societies. Peace, it is argued, is a balance of three elements – *security*, *justice* and *reconciliation* – that sometimes reinforce and other times contradict with each other. The peacebuilding potential of human rights depends on how much they can contribute to the promotion of each of these three elements. However, rather than adopting a critical stance on the extent of this contribution, international peacebuilders have assumed that a wholly positive relationship exists between the protection of rights on the one hand and the promotion of the elements on the other. Illustrative of this is Bertrand Ramcharan's assertion, at a time when he was the Acting UN High Commissioner for Human Rights, that '[i]nternational human rights norms define the meaning of human security'.<sup>3</sup> Similarly, Parlevliet unquestioningly accepts a positive relationship between human rights and the element of justice when she argues that '[h]uman rights actors [focus ...] directly on justice as the foundation for a lasting peace'.<sup>4</sup> Equally confident is the expectation that there is a positive connection between human rights and the element of reconciliation, with the UN Brahimi Report declaring that 'reconciliation [...] requires that past human rights

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2014) and International Crisis Group, 'Divided Cyprus: Coming to Terms on an Imperfect Reality', (Nicosia/Istanbul/Brussels: International Crisis Group, 2014).)

<sup>2</sup> This is not to argue that human rights are not valuable in and of themselves; however, they should be protected *as part of the peacebuilding process* only to the extent that they can contribute to it.

<sup>3</sup> Bertrand Ramcharan, 'Human Rights and Human Security', *Disarmament Forum*, 3 (2004), 39 at 41.

<sup>4</sup> Michelle Parlevliet, 'Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management', *Track Two Occasional Paper* 11(1), (Cape Town: Centre for Conflict Resolution, 2002), 1 at 11.

violations be addressed'.<sup>5</sup> Assuming that human rights can only make positive contributions to each of the three elements results in rather simplistic expectations about an equally positive relationship to peace. Thus, unqualified statements that 'a peace that is not accompanied by strategies for the promotion and protection of human rights is unlikely to be a lasting one' are commonplace in the literature.<sup>6</sup>

Problematically however, this expectation for a positive relationship has not materialised in practice. Rather, a theoretical analysis of the key terms suggests that human rights are potentially, but not always helpful in promoting the three elements of peace. In particular, it becomes clear that feelings of security and justice are often promoted through the protection of human rights, but they might also require their limitation. For instance, protecting the right to property and empowering displaced people to return to their houses sends a powerful message that the war is over and that the society in question is becoming (more) secure; at the same time however, peacebuilders might discourage the return of refugees due to fears that the interaction between ethnic groups might result in further violence. Similar conclusions can be reached about the connection between justice and human rights: justice might on the one hand, demand that displaced people receive restitution of their properties, but if a significant period of time has passed since their displacement, the protection of the right through the properties' restitution might in itself create a new unjust situation. In addition to this dual – positive *and* negative – relationship, it is often the case that the protection of human rights is not connected to the peace elements at all. This is particularly true in relation to reconciliation, which is based on the meaningful cooperation between the members of different ethnic groups. The most effective way of achieving this is through mechanisms that address the people themselves; in this respect, the tendency of human rights to focus on laws and institutions offers an explanation for their rather limited reconciliation-promoting potential.

This more nuanced relationship of peace and human rights, which consists of positive, negative or no connections between the two, is not only apparent from a theoretical

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<sup>5</sup> Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations', (New York: United Nations, 2000) at [22]. (Henceforth, 'Brahimi Report'.)

<sup>6</sup> Ramcharan, 'Human Rights and Human Security' at 44.

analysis of the key terms, but is also clear in the ethnically divided, post-conflict societies themselves. On the one hand, human rights provide the appropriate language and forums for the successful management of certain conflicts dividing the society and their protection can result in legal and institutional amendments necessary for the building of peace. On the other, this is only the best-case scenario since human rights decisions often remain unenforced. Even in cases where they are implemented however, their contribution is always limited: peacebuilders tend to ignore the fact that the most divisive and destructive conflicts cannot be successfully managed by the judiciary. Moreover, it is often not acknowledged that human rights protection cannot, on its own, lead to the political, socio-economic and psychological changes that divided societies must go through. Unless such changes take place however, simply enforcing human rights, no matter how successfully, can only result in a hollow peace: a society that looks secure and attractive from the outside, yet unreconciled and unstable from the inside. While in hindsight these are rather obvious conclusions to reach, peacebuilders on the ground do not seem to have taken them on board. Their blind trust in human rights focuses their attention only to the positive connection between the two concepts, which often has detrimental results for the overall objective of building peace.

Arguably, these conclusions have much broader implications than merely determining the relationship between peace and human rights. Rather, they point to the need to abandon the liberal peacebuilding strategy currently used today and replace it with an alternative one instead. This will value the contributions of human rights – and the legal and institutional amendments they can induce – but will also acknowledge their limitations and the need to supplement, or even replace, them with alternative peacebuilding tools as well. These tools, which will be concerned with the people rather than the laws of the ethnically divided, post-conflict society, can vary. They can include top-down measures, such as the creation of a Truth and Reconciliation Commission, or bottom-up ones, like organising victim-led workshops between members of different ethnic groups. Such people-centred strategies form an important component of the alternative peacebuilding approach because only when the grassroots change their perceptions can feelings of security, justice and in particular

reconciliation, all of which are necessary for peace, be induced.<sup>7</sup> In addition to expanding its areas of concern (more broadly social rather than merely legal) and the numbers of people it is addressing (the grassroots and not just the political elites), the alternative peacebuilding approach is expansive in one more way: it seeks contributions from and empowers not just lawyers, but other types of professionals as well, such as teachers, journalists, religious leaders and policemen. The concluding chapter of the thesis elaborates on these characteristics of the alternative approach, but also warns against the adoption of one-size-fits-all peacebuilding strategies for different ethnically divided, post-conflict societies. This need to adopt context-specific approaches might make peacebuilding more difficult to achieve, but it also makes its effects more meaningful for the people in practice.

### **3. The importance and interest of the subject**

It is because of its practical consequences for peacebuilding operations on the ground that there is an urgency in clarifying the relationship between peace and human rights. At the moment there is a perception that any failures of human rights and other liberal peacebuilding tools to promote peace are mainly due to their non-implementation or other exogenous factors such as underfunding or lack of cooperation between the peacebuilding actors.<sup>8</sup> Failures are never because of the protection of human rights *per se*. Nevertheless, a belief that ‘a bit more human rights can never make things worse’ is dangerous because it necessarily ‘places blame for whatever goes wrong elsewhere’.<sup>9</sup> Implementation and funding considerations are important, but they should not cloud the possibility that what we ask of human rights in peacebuilding operations might simply be too much.

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<sup>7</sup> Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', *Journal of Law & Society*, 34(4) (2007), 411.

<sup>8</sup> Roland Paris, 'Understanding the "coordination problem" in postwar statebuilding', in Roland Paris and Timothy D. Sisk (eds.), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (London: Routledge, 2009), 53. This is further confirmed by statements from UN Secretary-General who identified the problem of peace operations as being an institutional one, with the creation of the Peacebuilding Commission providing the solution. (Address by United Nations Secretary-General Kofi Annan to the Fifty-sixth session of the Executive Committee of the High Commissioner's Programme (Geneva, 6 October 2005), on <http://www.unhcr.org/43455d812.html> [accessed 19 December 2014].)

<sup>9</sup> David Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal*, 15 (2002), 101 at 124 and 122 respectively.

Since the end of the Second World War, which marked the first modern attempts to build peace, and until today, peacebuilding operations have evolved and become much more sophisticated in their objectives and methods. Problematically however, at no point during this process, has the effectiveness of human rights as peacebuilding tools been seriously questioned. The emphasis that was placed on human rights during the early peacebuilding operations is reflected in the establishment of the Nuremberg and Tokyo Tribunals, which were intended to prosecute perpetrators of serious human rights violations.<sup>10</sup> International peacebuilding went into hibernation during the Cold War, but the fall of communism at the end of the 20<sup>th</sup> century led to the second stage of its development.<sup>11</sup> Peacebuilding operations during this period – in South Africa, the ex-USSR bloc and Latin America – questioned a number of its key assumptions, such as whether the use of criminal trials was the best way to promote peace, or whether Truth and Reconciliation Commissions coupled with amnesties were more appropriate. However, the importance of human rights, either by punishing or being open about their violations, remained among the cornerstones of the peacebuilding efforts. The third, and current, stage places even more importance on human rights by making them a key tenet of the liberal peacebuilding recipe, which is being implemented, since the mid-1990s, by international and domestic peacebuilders around the world.<sup>12</sup>

Liberal peacebuilding is based on the premise that peace in ethnically divided, post-conflict societies can only be built and maintained in the context of democratic and free market societies. The expectation is that on the one hand, the competition that democracy and free markets entail can help channel ethnic conflicts and express them in non-violent ways.<sup>13</sup> On the other, the vested interests that will stem from a democratic and prosperous society will eventually make war a less attractive choice. Whether these arguments are theoretically persuasive or empirically correct has attracted little attention;<sup>14</sup> rather, the peacebuilders' faith in political and economic

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<sup>10</sup> Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2<sup>nd</sup> edn.; Cambridge: CUP, 2012) at 109-19.

<sup>11</sup> Ruti G. Teitel, 'Transitional Justice Genealogy', *Harvard Human Rights Journal*, 16 (2003), 69.

<sup>12</sup> Oliver Richmond, *The Transformation of Peace* (Basingstoke: Palgrave Macmillan, 2006).

<sup>13</sup> UN Secretary-General, 'An Agenda for Democratization', (New York: United Nations, 1996) at [17] and [64].

<sup>14</sup> The democratic peace thesis has been discussed extensively in inter-state conflicts, but the extent to which it applies *within* ethnically divided, post-conflict states remains uncertain. (Steve Chan, 'In

liberalism has been the natural consequence of the outcome of the Cold War and the prevalence of Western values. Yet, this lack of a proper debate about the tenets of liberal peacebuilding has not stopped confident pronouncements that ‘there is an obvious connection between democratic practices [...] and the achievement of true peace’<sup>15</sup> or that ‘the key root cause of conflict is the failure of economic development’.<sup>16</sup> It is in this context that the expectation about the peacebuilding potential of human rights has taken root and flourished: since the very existence of democracy and free markets is based on human rights – the rights to vote and property in particular – their protection becomes an important ingredient of the liberal peacebuilding recipe itself.

The assumption in favour of the peacebuilding effects of human rights has been repeated time and again by academics and UN policy makers alike. For instance, the UN report *An Agenda for Peace* has recognised that ‘human rights monitors, electoral officials, refugee and humanitarian aid specialists’, in other words those professionals that are most directly concerned with the implementation of human rights, play a central role in peacebuilding operations.<sup>17</sup> Similarly, the UN High-level Panel on Threats, Challenges and Change has expressed its support for the integration of human rights throughout the work of the UN and the development of strong domestic human rights institutions, especially in countries emerging from conflict.<sup>18</sup> Finally, the opening line of UN General Assembly Resolution 52/13 states that ‘the promotion of a culture of peace [is] based on the principles established in the Charter of the United Nations and on respect for human rights’.<sup>19</sup> Echoing policy makers, academics have also endorsed the view that human rights are essential peacebuilding tools. For example, Bell concludes her detailed analysis of four peace agreements by stating that ‘[t]he strength of the human rights protections and the unitary state are integrally

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Search for Democratic Peace: Problems and Promise’, *Mershon International Studies Review*, 41 (1997), 59.)

<sup>15</sup> UN Secretary-General, ‘An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992’, (New York: United Nations, 1992) at [59].

<sup>16</sup> Paul Collier and et al., *Breaking the Conflict Trap: Civil War and Development Policy* (Washington: World Bank and OUP, 2003) at 53.

<sup>17</sup> UN Secretary-General, ‘An Agenda for Peace’ at [52].

<sup>18</sup> High-Level Panel on Threats Challenges and Change, ‘A More Secure World: Our Shared Responsibility’, (New York: United Nations, 2004) at [284].

<sup>19</sup> United Nations General Assembly Resolution (UNGAR) 52/13 (15 January 1998).



linked – they thrive or fail together’,<sup>20</sup> while Barash and Webel,<sup>21</sup> Little<sup>22</sup> and Reychler<sup>23</sup> all include human rights protections among their recommended peacebuilding tools.

Moreover, the enthusiastic acceptance of human rights in policy reports and academic writings has influenced peacebuilding practices in ethnically divided, post-conflict societies themselves. Human rights protection mechanisms have been aptly described as ‘the universally recognised chic language in which to write peace agreements’ and they remain central to peacebuilding activities, even after negotiations have been concluded.<sup>24</sup> Illustrative of this is the fact that the post-conflict Constitution of Bosnia and Herzegovina makes the country a member to 16 international human rights agreements.<sup>25</sup> Also, the South African Constitution, which ended apartheid, contains one of the most robust Bills of Rights, with civil, political, economic, social, cultural and group protections.<sup>26</sup> Finally, the Northern Ireland’s Good Friday Agreement often refers to human rights, precisely because any impasse during the negotiations was overcome by resorting to the accepted standards of international law.<sup>27</sup> Reflecting a more global tendency, the UN Peacebuilding Commission has so far spent approximately \$70 million of its meagre budget on ‘projects that bolster good governance and promote national dialogue and reconciliation, including projects that promote human rights’.<sup>28</sup>

These expectations about the peacebuilding potential of human rights can be justified in two ways. The first is based on the idea that the failure to protect human rights is likely to result in an eruption of violence. This justification is mentioned in the preamble of the Universal Declaration of Human Rights, which considers them as

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<sup>20</sup> Christine Bell, *Peace Agreements and Human Rights* (Oxford: OUP, 2000) at 294.

<sup>21</sup> David P. Barash and Charles P. Webel, *Peace and Conflict Studies* (2<sup>nd</sup> edn.; California: SAGE Publications, 2009).

<sup>22</sup> David Little, ‘Peace, Justice and Religion’, in Pierre Allan and Alexis Keller (eds.), *What Is Just Peace?* (Oxford: OUP, 2006), 149.

<sup>23</sup> Luc Reychler, *Democratic Peace-Building and Conflict Prevention: The Devil Is in the Transition* (Leuven: Leuven University Press, 1999).

<sup>24</sup> Bell, *Peace Agreements and Human Rights* at 298.

<sup>25</sup> Constitution of Bosnia and Herzegovina, Annex 4 of the General Framework Agreement signed on 14 December 1995 (henceforth, BiH Constitution), Annex I.

<sup>26</sup> Constitution of the Republic of South Africa [No. 108 of 1996] (henceforth, SA Constitution), Sections 7-39.

<sup>27</sup> The Northern Ireland Peace Agreement, Agreement Reached in the Multi-Party Negotiations, signed on 10 April 1998; Bell, *Peace Agreements and Human Rights* at 173.

<sup>28</sup> United Nations Peacebuilding Fund, <http://www.unpbf.org/what-we-fund/> [accessed 6 June 2014].

necessary for the prevention of the rebellion against tyranny, and in the Brahimi Report and *An Agenda for Peace*, which argue for the protection of minority rights as an effective conflict prevention method.<sup>29</sup> Nevertheless, this argument is usually based on intuition rather than robust empirical evidence. There is, at most, *some* evidence that violations of civil and political rights, or of economic rights coupled with discrimination, are *among the factors* that can promote violence; uprisings are not necessary and unavoidable consequences of all human rights violations.<sup>30</sup> Moreover, even in cases where violence does erupt, it does not follow that human rights protections can stop the fighting after it has already broken out, which is what peacebuilding is concerned with. And even if it did, stopping violence is not synonymous with building peace; rather, a secure environment is just the first step of the overall objective. However, if peace requires something more than the absence of violence, it is not clear what that is and whether human rights can indeed contribute to its promotion.

This leads to the second justification for their protection, namely, that if human rights violations caused the eruption of violence, safeguarding those rights can undo that and build peace. Thus, an *Agenda for Peace* states that ‘the sources of war are pervasive and deep’ and that in order to undo them, we must enhance our respect for human rights.<sup>31</sup> However, one does not necessarily follow from the other. Large-scale human rights violations can cause deep personal, psychological, cultural, social, economic and political rifts. Protecting human rights might successfully address some of these problems, but not all. Yet, the *Agenda* does not provide any further explanation as to which of these problems can be resolved through human rights protections, how or why. It also remains unclear whether other peacebuilding tools that can deal with these additional problems should supplement human rights and what these are. Thus, neither of the two arguments provide clear reasons for the expected peacebuilding potential of human rights. In turn, the lack of a well-developed justification clouds the relationship between the two concepts. It is this gap in the literature, which directly affects peacebuilding practices on the ground that this thesis aims to fill.

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<sup>29</sup> Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations', (New York: United Nations, 2000) (henceforth, 'Brahimi Report') at [29]; UN Secretary-General, 'An Agenda for Peace' at [18].

<sup>30</sup> Oskar N. Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?', *Human Rights Quarterly*, 29 (2007), 674.

<sup>31</sup> UN Secretary-General, 'An Agenda for Peace' at [5].

#### **4. The methodology**

When examining the relationship between human rights and peace, I made a series of choices that have undoubtedly affected my conclusions and are therefore in need of an explanation. First, stemming from my belief that theory influences practice and vice-versa, I decided to focus on both: simply analysing academic writings and UN reports would be an artificial exercise of little value, while only paying attention to the peacebuilding operations themselves could result in rather superficial findings. Second, I opted to examine two human rights – the rights to vote and property – rather than undertake a more general analysis of human rights as a whole. Most of my conclusions can be generalised, but a more detailed examination of the effects of other rights, such as freedom from discrimination, in ethnically divided societies would be valuable. Third, the term ‘peacebuilding’ has been used after occurrences of both inter and intra-state violence, and since the two give rise to varying challenges, I only concentrated on the latter; moreover, I became particularly interested in those countries where the intra-state violence erupted because of ethnic divisions. Finally, wishing to avoid context-specific conclusions, I opted for a comparative approach and focused on three – rather different – case studies: Bosnia and Herzegovina (BiH); South Africa (SA); and Cyprus. This section elaborates on the thought process behind each of those choices.

My first methodological choice concerns the decision to approach the question both from a theoretical and a practical point of view. A theoretical analysis of the key terms is essential because the precise meaning of ‘peace’ and ‘human rights’ must be clear before the relationship between them can be established. This is particularly important in relation to the definition of peace since it allows us to determine from the beginning, and independently of any practical limitations that may exist on the ground, what it is that ethnically divided, post-conflict societies should ideally be striving towards. Moreover, a theoretical analysis of the relationship is valuable because clarifying the nature and characteristics of the two terms, allows one to make room for the possibility that there are *inherent* reasons for the limited peacebuilding potential of human rights. However, merely looking at how the two terms connect in

theory is inadequate because this only sheds light on one side of the relationship. If one is to also identify *practical* explanations for any disappointing outcomes that might exist, it is necessary to rely on observations of peacebuilding operations on the ground as well.

Thus, it is argued in Chapter 7 that one of the limitations of human rights is that they can induce legal and institutional amendments, but not the political or socio-economic changes that are also necessary for peace. The immediate response to this conclusion is that this is only a limitation of the peacebuilding potential of human rights, if peacebuilders are *in fact* expecting such changes to stem from their protection. The theoretical literature provides some evidence of such expectations,<sup>32</sup> but the most persuasive proof arises from the fact that, in practice, peacebuilders have regularly failed to supplement human rights with other mechanisms that could induce such political or socio-economic changes.<sup>33</sup> This suggests that peacebuilders on the ground perceive human rights to be, not only necessary tools for the building of peace, but also often sufficient ones. It is this latter expectation, which is almost always absent from policy reports, yet prevalent in ethnically divided, post-conflict societies themselves, that I seek to challenge in this thesis.

My second methodological choice relates to my decision to focus on only two rights, namely, the right to property and the right to vote. On the one hand, if the objective of this thesis is to examine the relationship between peace and human rights in general, this might be criticised as being an unduly constraining choice of lens. On the other, the term ‘human rights’ has been used to describe so many different goods that we value in our societies that an analysis that sought to draw any robust conclusions would have to restrict the meaning of the term in some way. It would be both impossible and unhelpful to reach any conclusions about the relationship in question if by ‘human rights’ I meant something broad, unclear and contested. It is partly because of this consideration that I chose to not focus on the protection of socio-

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<sup>32</sup> For example, when Parlevliet argues that in order to build peace, it is necessary to ‘entrench respect for human rights in state institutions and the societal infrastructure’. (Michelle Parlevliet, ‘Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management’ at 12.)

<sup>33</sup> Detailed evidence of this, both in relation to the right to vote and the right to property, is provided in Chapter 7.

economic rights, such as the right to housing or education.<sup>34</sup> An additional factor that influenced this decision is the fact that with the exception of SA, in very few, if any, ethnically-divided, post-conflict societies, have socio-economic rights resulted in significant case law. In any case, while I have only focused on two human rights, the rights to vote and property are connected to a range of political and socio-economic issues that peacebuilders in ethnically divided, post-conflict societies are likely to consider important. They are therefore likely to provide a representative sample of the types of contributions that human rights can make to the building of peace.

In addition to the broad range of issues that they are concerned with, my choice to focus on the rights to property and vote was affected by several other considerations. On a superficial level, the two rights were preferred because BiH, SA and Cyprus have suffered or are suffering from serious forced displacement problems and political conflicts concerning their democratic structures. As a result, the two rights have been at the forefront of peacebuilding attempts and have generated case law in all three countries. The case law relates to a relatively narrow and specific range of problems, as opposed to other, much broader rights (such as freedom from discrimination), which are more difficult to compare. More significantly however, the two rights go to the heart of the liberal peacebuilding project that is under scrutiny here: they are directly connected and in fact essential to its two main pillars – democratisation and economic liberalisation. The right to vote is the cornerstone of democracy and no free market can operate properly without protecting the right to property. Illustrative of the former's prominent role in peacebuilding operations is Alden's observation that in the African context 'the international community actively promoted electoral democracy as a panacea for everything from ethnic conflict to territorial disputes'.<sup>35</sup> Thus, the choice of these rights allows me to not only examine

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<sup>34</sup> There are, for instance, still disagreements as to whether socio-economic rights successfully address or merely sideline the needs of the victims. See, for instance, Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited', *Human Rights Quarterly*, 29 (2007), 796.

<sup>35</sup> Chris Alden, *Mozambique and the Construction of the New African State: From Negotiations to Nation Building* (New York: Palgrave, 2001) at xvii. The same expectation was expressed in less absolute terms by the US Committee of the Commission on Security and Cooperation in Europe in BiH, when it noted that 'continuous elections, if held in as free and fair a manner as possible, have been viewed by the international community as a means to bring stability and recovery to a country divided by extreme nationalist political leaders'. (Commission on Security and Cooperation in Europe (US), 'Elections in Bosnia-Herzegovina: September 12-13, 1998', (Washington: Commission on Security and Cooperation in Europe, 1998) at 1.)

their effects *per se*, but also observe how they relate to key peacebuilding objectives more generally. Finally, the two rights are not only of a particular interest to peacebuilders, but to the people on the ground as well. They acquire their elevated importance through their connection to power and legitimacy: property rights afford economic advantages to their right holders, while the right to vote is accompanied by a sense of political power and equality since it quite literally implies that every citizen counts.

My third methodological choice was to focus on the relationship between peace and human rights in a specific context, namely that of ethnically divided, post-conflict societies. An analysis of the relationship between peace and human rights can include a number of scenarios: it could, for instance, focus on the effect of human rights in regional peacebuilding attempts following inter-state conflict. An example of this could be an assessment of how human rights protections through the Council of Europe promoted peace between the European states after the Second World War. Alternatively, it could concentrate on the effects of human rights following the occurrence of violence within a state; in turn, this intra-state violence can be caused either by political conflicts (such as the Communist revolution in Russia in 1917) or ethnic ones (such as the Yugoslav wars of the 1990s). This thesis focuses on the latter category of peacebuilding operations – those taking place within ethnically divided, post-conflict states – for three reasons: first, intra-state ethnic conflicts are today the most common and destructive type of conflict.<sup>36</sup> They result in the highest number of civilian victims and, due to the very close proximity between the combating parties, they cause the greatest levels of insecurity among the population. Second, ethnically divided, post-conflict societies pose unique challenges to peacebuilders because of the vicious circle they find themselves trapped in: the violent conflict intensifies the ethnic divisions that are undermining peace, while the ethnic divisions themselves make it more likely that the society will resort back to violence. Third, these are the types of societies – among them Burundi, Liberia, Timor Leste, Bosnia, Afghanistan and Iraq – that have attracted the attention of the international community and have

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<sup>36</sup> According to Choudhry, there were 146 intra-state conflicts resulting in more than 20 million deaths between 1945 and 1999. By contrast, the count for inter-state conflicts is 25 and 3 million respectively. (Sujit Choudhry, 'After the Rights Revolution: Bills of Rights in the Post-Conflict State', *Annual Review of Law and Social Science* 6 (2010), 301 at 308.)

been subject to the liberal peacebuilding assumptions that I seek to explore in more detail.

Opting to concentrate on ethnically divided societies makes it necessary to be clear about their characteristics and the way these affect relationships between people. 'Empirically, it is relatively easy to determine which conflict is an ethnic one: one knows them when one sees them.'<sup>37</sup> They erupt in societies divided by religion, language, culture, history or race. The ethnic groups within them are politically organised and have certain demands, usually relating to non-discrimination or greater recognition of their differences. These groups deem such demands to be necessary because they perceive their identities to be distinct and in many cases diametrically opposed to each other.<sup>38</sup> This is what Miller calls 'rival nationalities': the groups see themselves as having an antagonistic relationship, partly because they define their identity as that which the other is not.<sup>39</sup> Of course, not every ethnically divided society manifests its divisions violently; examples from Spain/Catalonia and Canada/Quebec testify to this. However, where violence does erupt, ethnicity becomes the most dominant characteristic of a person's identity, ethnic groups tend to act cohesively on almost all political issues and, as a result, at least shortly after the war, the conflicts that arise between them are usually zero-sum in nature. Finally, since political threats are not easily distinguished from personal ones, ethnic characteristics in such societies determine not only who people vote for, but also who they socialise with and marry, who they work with or employ and ultimately, who they are afraid of and distrust.

The most effective way of observing different ethnically divided, post-conflict societies is to compare them. Yet, very few comparisons of their laws and

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<sup>37</sup> Stephan Wolff, 'Managing and Settling Ethnic Conflicts', in Ulrich Schneckener and Stephan Wolff (eds.), *Managing and Settling Ethnic Conflicts: Perspectives on Successes and Failures in Europe, Africa and Asia* (London: Hurst & Co Publishers, 2004), 1 at 1.

<sup>38</sup> Margaret Moore, 'Globalization, Cosmopolitanism and Minority Nationalism', in Michael Keating and John McGarry (eds.), *Minority Nationalism and the Changing International Order* (Oxford: OUP, 2001), 44.

<sup>39</sup> David Miller, 'Nationality in Divided Societies', in Alain G. Gagnon and James Tully (eds.), *Multinational Democracies* (Cambridge: CUP, 2001), 299 at 303.

constitutions have actually been attempted.<sup>40</sup> Instead, most comparisons of such case studies have stayed within the exclusive ambit of political science, and while these are useful in their own right, they are ill-suited to deal with any legal questions that might arise.<sup>41</sup> This gap in the literature is both surprising and disappointing because different ethnically divided, post-conflict societies have in fact adopted similar constitutional provisions in order to deal with their shared problems. For instance, the Annan Plan, a peace agreement that was put to a referendum in Cyprus in 2004,<sup>42</sup> is strikingly similar to the Dayton Agreement,<sup>43</sup> the settlement that ended the Bosnian war in 1995.<sup>44</sup> Moreover, the lack of legal comparison among different ethnically divided societies is even more unexpected because it is incompatible with the general trend among lawyers to compare constitutions when addressing other questions, such as how a Bill of Rights is to be drafted.<sup>45</sup> Thus, a comparative methodology is also in line with the practice of ‘cosmopolitan constitutionalism’ that already exists in contexts other than those of ethnically divided, post-conflict societies.<sup>46</sup> As Harding and Leyland put it, ‘[t]he comparative dimension is now so ingrained that it is hard to imagine any constitution-building effort without it.’<sup>47</sup> Finally, comparisons are valuable since confirmation of the conclusions from one case study by those of another makes them not only relevant to the country in question, but also more easy to generalise, broadly relevant and persuasive.

My decision to follow a comparative approach resulted in the choice of three case studies: Bosnia-Herzegovina, South Africa and Cyprus.<sup>48</sup> All three are ethnically

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<sup>40</sup> Rare examples of this include Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: OUP, 2004) and Yash Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: CUP, 2000).

<sup>41</sup> See for example, Sumantra Bose, *Contested Lands: Israel-Palestine, Kashmir, Bosnia, Cyprus and Sri Lanka* (Cambridge, Mass: Harvard University Press, 2007) and Donald Horowitz, *Ethnic Groups in Conflict* (2<sup>nd</sup> edn.; Berkeley: University of California Press, 1985).

<sup>42</sup> The Comprehensive Settlement of the Cyprus Problem, finalised on 31 March 2004 and put to a referendum on 24 April 2004.

<sup>43</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995.

<sup>44</sup> Bose, *Contested Lands: Israel-Palestine, Kashmir, Bosnia, Cyprus and Sri Lanka* at 100.

<sup>45</sup> Choudhry, 'After the Rights Revolution: Bills of Rights in the Post-Conflict State'.

<sup>46</sup> Jeffrey Goldsworth (ed.), *Interpreting Constitutions: A Comparative Study* (Oxford: OUP, 2007) at 3.

<sup>47</sup> Andrew Harding and Peter Leyland, 'Comparative Law in Constitutional Contexts', in Esin Örüçü and David Nelken (eds.), *Comparative Law: A Handbook* (Oxford and Portland, Oregon: Hart Publishing, 2007), 313 at 327.

<sup>48</sup> Additional background information about the conflicts in the three case studies is available in the Appendix.



divided, post-conflict societies that have relied heavily on the protection of human rights in order to resolve differences within their population and build peace. Cypriots, Bosnians and South Africans have suffered from serious displacement problems and their response to these has been to focus on the protection of the right to property. Similarly, ethnic groups in the three countries have been divided by political conflicts concerning their preferred democratic structures and processes, which the right to vote has sought to address. Unlike other ethnically divided societies, such as Northern Ireland for example, the three case studies share the characteristic that they are also sovereign states. This is an important consideration since if the political actors fail to deal with the conflicts that divide the ethnic groups they represent, these might result in the paralysis of the state and even its dissolution.<sup>49</sup> A final similarity between the case studies concerns the fact that their case law and relevant legal literature are largely available in English, thus ensuring that any comparative work will not suffer from linguistic limitations.<sup>50</sup>

Despite these similarities, BiH, SA and Cyprus are also demographically and geographically very different. SA, with its population of 52 million, is several times bigger than BiH (4 million) and Cyprus (approximately 1.5 million). The relative sizes of the ethnic groups also vary: while they are roughly equal in BiH, the Greek Cypriots in Cyprus and the Africans in SA make up the big majorities of their countries' populations. Furthermore, Cyprus and SA are further distinguished by the fact that their ethnic groups are also divided along socio-economic lines, while this is less of a problem in BiH whose socialist past left most Bosnians in a roughly equal economic position. These differences arguably make the comparison between the three case studies more fruitful since they provide an opportunity to observe how different conditions influence the effect of human rights on peace. For instance, they illustrate how huge socio-economic differences in SA or a very small population in

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<sup>49</sup> See, for example, arguments from (usually Bosnian Serb politicians) that the cumbersome democratic process and the consequent inability of the Bosnian government to reach decisions efficiently should result in the dissolution of the state. (Elvira M. Jukic, 'Bosnian Serb Chief Says Country Should Split', *Balkan Insight*, 20 November 2013.) Similarly, it was the inability (or unwillingness) of the Cypriot politicians to use the political processes outlined in the 1960 Constitution of the Republic of Cyprus in order to manage their disagreements that resulted in the withdrawal of the Turkish Cypriot representatives from government in 1963 and seriously deteriorated inter-ethnic relations. (Michális Stavrou Michael, *Resolving the Cyprus Conflict: Negotiating History* (New York: Palgrave Macmillan, 2009 at Chapter 1).

<sup>50</sup> This was the reason that other potential case studies, which also suffer from displacement problems and dilemmas concerning the political process, such as Israel/Palestine, were ultimately rejected.

Cyprus can affect the peacebuilding potential of human rights. Moreover, the diversity in the three case studies has resulted in human rights operating alongside different peacebuilding tools; examples of these include the Truth and Reconciliation Commission in SA and the use of international aid to incentivise political cooperation in BiH. The way such tools and methods supplement the peacebuilding potential of human rights is worth examining.

The geographic differences between the three case studies also result in varying influences from different regional institutions: while Cyprus is a member of the EU and the Council of Europe, BiH is only a member of the latter, while SA is a member of neither. This difference has affected the level of international involvement in the peacebuilding process more generally: conversely to Cyprus and BiH where the international community is playing an active role in the peacebuilding process, the SA transition has remained a mostly domestically controlled enterprise. Even this difference however, is a matter of degree. Since local stakeholders have received financial aid from a number of foreign countries and organisations which adhere to the liberal peacebuilding agenda, SA has also been affected by international peacebuilders' assumptions.<sup>51</sup> As a result, the three case studies, with their varying levels of international involvement, provide evidence of the extent to which the international community, rather than domestic actors, has contributed to peacebuilding efforts.

An additional difference between three case studies concerns the level of development of the peacebuilding process in each of them: while the Cyprus conflict is still at a pre-negotiation stage, peace agreements were concluded in BiH and SA more than 20 years ago. The fact that the Bosnian and South African peace processes have been underway for a much longer period of time than the Cypriot one provides two additional insights to the analysis undertaken here. First, it makes it possible to examine the extent to which human rights have varying strengths and weaknesses during different stages of the peacebuilding process. Indeed, as it will be argued in Chapter 5, the legal protection of human rights can contribute more during the latter parts of the peacebuilding process when the most divisive conflicts will have already

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<sup>51</sup> Julie Hearn, 'Foreign Aid, Democratisation and Civil Society in Africa: A Study of South Africa, Ghana and Uganda', Discussion Paper 368 (Institute of Development Studies, 1999).

been managed through political negotiations. The second advantage of examining peace processes at different stages of their development is that the experiences in BiH and SA can be used as lessons for how the peacebuilders in Cyprus should act and what they should seek to avoid.

The definition of peace elaborated in Chapter 2 has also been relevant when choosing the three case studies because each has prioritised security, justice and reconciliation to a different degree. In Cyprus, the physical division between the two ethnic groups was originally justified – and is still perceived by some – as a way of promoting the physical security of the island’s inhabitants; considerably less attention has been paid to efforts to promote justice and reconciliation.<sup>52</sup> Conversely, in BiH, the international community’s security and reconciliation concerns are being dwarfed in comparison to the attention received by the International Criminal Tribunal for the Former Yugoslavia, which is intended to promote justice in the area.<sup>53</sup> Finally, as the existence of the Truth and Reconciliation Commission suggests, the greatest emphasis in SA, both on the rhetorical and practical level has been paid to reconciliation, with security and justice considerations falling further behind.<sup>54</sup>

The varying emphasis on security, justice and reconciliation in the three case studies is noteworthy because it provides insights about the relationship of each with the more general objective of peace. In particular, it answers questions as to whether protecting only one of the elements is a good peacebuilding strategy and discusses the long-term effects of this in the ethnically divided, post-conflict societies themselves. Moreover, the fact that all three countries have protected human rights, while simultaneously having different primary considerations (security in Cyprus, justice in BiH and reconciliation in SA) allows us to draw conclusions about the relationship

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<sup>52</sup> Referring to the disproportionate attention paid to the element of security, the UN Secretary-General aptly described the Cyprus conundrum in the following terms: ‘Each side felt vulnerable to a larger potential enemy – the Greek Cypriots feared the Turkish Goliath, the Turkish Cypriots feared the Greek Cypriot Goliath.’ (UN Secretary-General, ‘Report of the Secretary-General on His Mission of Good Offices in Cyprus’, (1 April 2003) at [20].

<sup>53</sup> Between 1993 and 2009, the official budget of the Tribunal amounted to \$1,585,490,022. (Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2<sup>nd</sup> edn.; Cambridge: CUP, 2012) at 135).

<sup>54</sup> The Act that created the Truth and Reconciliation Commission is based on the premise that ‘the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society’. (Promotion of National Security and Reconciliation Act [No. 34 of 1995].) Considerations of security and justice in the aftermath of apartheid have not received as much attention from the legislature.

between human rights and each of the three elements. These conclusions, which are discussed in more detail in Chapter 4, confirm that while security and justice can be promoted by human rights, they can also be undermined by them. At the same time, all three elements, and in particular reconciliation, are often promoted most effectively through peacebuilding tools that are not connected to human rights at all, thus pointing to the possible danger of rights over-reliance.

## **5. The structure**

The thesis is divided between a theoretical and a practical analysis of the relationship between human rights and peace. Part 1, the theoretical section, defines the two key concepts and, bearing in mind the characteristics of each, concludes that we must adopt a more nuanced understanding of how they connect than the international community has done so far. In addition to the expected positive contributions that human rights can make, it should also be acknowledged that they are often not connected to peacebuilding attempts at all and that their protection can sometimes even have negative consequences. This conclusion is confirmed and its importance highlighted in Part 2, the practical section of the thesis, which examines the extent to which human rights have contributed to the building of peace in ethnically divided, post-conflict societies themselves.

Chapter 2, which defines peace, argues that it is made up of three elements: security, justice and reconciliation. Security exists when the conditions on the ground prevent a sense of fear from war, internal conflict or serious crime. Justice demands that the injustices of the war are remedied and that they are prevented from being repeated in the future. Finally, reconciliation focuses on the creation of meaningful relationships of cooperation – on the personal and political levels – between former enemy parties. The three elements can promote each other, but they can also contradict, thus making it necessary to strike a balance between them. The longer they are present and balanced against each other in a given ethnically divided, post-conflict society, the more peaceful that society becomes. Chapter 3 defines human rights as *legal* mechanisms that protect fundamental interests, either on the domestic or the international level. This definition is quite narrow in that it excludes moral

conceptions of human rights and the contributions they can make to peacebuilding by incorporating them, for example, in school curriculums. It is nevertheless compatible with the existing policy decisions of peacebuilders themselves, since it is legal rights, rather than their moral counterparts that they seem to be focusing on in practice.

Chapter 4 brings these two definitions together and examines the way in which human rights relate to peace. It argues that each of the elements of peace has a unique relationship with and is promoted in different ways and to varying extents by human rights. In particular, security and justice are positively connected to them since human rights protection ensures that the injustices and atrocities of the past will be punished and not be repeated again in the future. At the same time however, there is also a negative relationship at play since the protection of human rights might inadvertently compromise efforts to promote one of the elements of peace, or even explicitly require its limitation. Finally, all three elements, and in particular reconciliation, often make broader demands than what human rights can deliver, thus resulting in a situation where their protection, while valuable in itself, becomes an insufficient peacebuilding tool. Alluding to the practical significance of the question posed in this thesis, the chapter concludes by drawing the first conclusions about the use of human rights as part of the liberal peacebuilding strategy. In particular, it points to the need to adopt context-specific peacebuilding tools and strategies that supplement human rights by focusing on the people themselves, rather than just on the country's laws and institutions.

Part 2 of the thesis examines the relationship between human rights and peace on the ground by focusing on the peacebuilding operations in Bosnia and Herzegovina, Cyprus and South Africa. It starts from the premise that what makes balancing the three elements against each other difficult is the existence of fundamental, zero-sum conflicts between the previously warring parties. Such conflicts, an example of which is whether the state should protect people as members of ethnic groups or as individual citizens, are not susceptible to compromise. Consequently, tensions on how they should be managed can undermine feelings of justice and reconciliation among the population, and in worst case scenarios even have detrimental consequences for security. While it is impossible, and indeed undesirable, to eliminate all conflicts, these detrimental consequences for peace make it necessary to transform such zero-

sum disagreements into simpler, more practical ones. Conflicts that fall within this second category are more manageable, less disruptive to ethnic relations and more likely to result in a better balance between the three elements. Thus, the effectiveness of human rights in terms of building peace depends on the extent to which they can contribute to the transformation of one type of conflict to the other. It is in this light that the practical chapters discuss the strengths and weaknesses of human rights as peacebuilding tools in ethnically divided, post-conflict societies.

Chapter 5, which is concerned with adjudication of human rights, argues that they can successfully manage small-scale practical disagreements between the ethnic groups, but that the judiciary is ill-suited as an institution to deal with the fundamental, zero-sum conflicts that divide the society. Yet, it is these big questions, which human rights fail to address, that are undermining security, justice and reconciliation the most. It thus becomes necessary to strengthen the protection of human rights in relation to certain conflicts and, recognising their limitations, use alternative peacebuilding tools in order to manage the rest. Following this and focusing on post-adjudication challenges, Chapter 6 argues that even in cases where human rights can manage the conflict in question, the judicial decision might not be implemented in practice. It is moreover, possible that a judgment that has been enforced will fail to have the desired peacebuilding effects because the resulting change in the law might protect the interests of the individual applicant, but have no, or even negative, effects on the society as a whole. Whether a human rights decision will be implemented and if the resulting legal and institutional amendments will positively contribute to peace, mostly depends on the existence of political willingness to move in that direction. Acknowledging that nothing can really make up for the absence of a peace-friendly political elite, the chapter suggests ways to work around the problem.

Chapter 7 focuses on the final limitation of human rights, namely their inability to address what lies beneath the conflict. It argues that even where the conflict in question can be managed by adjudicating human rights and even if the Court's decision has been implemented successfully, this is only likely to result in legal and institutional amendments. Such a step is crucial but insufficient because the law cannot induce political, socio-economic and psychological changes that must also take place in order for peace to be built. It thus becomes necessary to insist on the

protection of human rights, but not do it to the detriment of other peacebuilding tools that must also be adopted. This analysis perhaps points to the gravest danger of human rights: the fact that in practice they have tended to monopolise attention and resources to the detriment of other tools that could have also contributed to peacebuilding efforts. In turn, this has resulted in a perverted type of peace, one that looks much more attractive to the outsider observers than to the people living in the ethnically divided, post-conflict society itself. If this is to be avoided, we must adopt a more nuanced understanding of the relationship between human rights and peace and, in doing that, replace the liberal peacebuilding approach with one that is concerned with political, socio-economic and psychological changes, in addition to legislative ones.

## **PART 1: The theoretical relationship between human rights and peace**

### **Chapter 2: Defining peace in ethnically divided, post-conflict societies**

#### **1. Introduction**

Since the general purpose of this thesis is to examine the relationship between peace and the protection of human rights, the first necessary step is to settle on a definition of the two main concepts in question. The first one, focused on in this chapter, is peace. Peace is understood here in a very specific way; the definition is not concerned with issues such as global or inter-state peace or with finding peace within an individual's personal domain. Rather, it focuses on peace within post-conflict, ethnically divided states. It is necessary to engage in a peace-defining exercise, not only because of the absence of a single accepted definition, but also due to the lack of a debate on the matter. Peace, it seems, is a 'you know it when you see it' type of concept. However, this lack of clarity about the term is problematic because it leaves unanswered questions, such as what peacebuilders are striving towards, whether they have achieved it and, if not, what kind of additional steps should be taken. These dangers are elaborated in more detail in Section 2.

The most sophisticated theoretical attempt to define peace so far has been made by Johan Galtung who developed the ideas of positive and negative peace.<sup>55</sup> As it is argued in Section 3, his suggested definition is initially appealing, but its broad and all-inclusive nature, ultimately makes it unworkable. Conversely, practical understandings of the definition of peace are guided by a belief that it can be built by adopting liberal institutions and practices, such as free and fair elections, a free market and an independent judiciary. Definitions deriving from this practical perspective are, however, also unsatisfactory, since they seem to be guided by nothing more theoretically robust than the urge to reproduce the trappings of already

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<sup>55</sup> Johan Galtung, 'An Editorial', *Journal of Peace Research*, 1/1 (1964), 1.



developed and liberal societies. A combination of these two approaches results in a growing confidence among peacebuilders that their methods can produce the desired result, while the content of this desired result becomes ever broader and more vague. It is with this context in mind that the exercise of providing a definition for peace in ethnically divided societies acquires its stated urgency.

The definition of peace suggested here seeks to address these problems and consists of three elements. The first element, *security*, exists when the conditions on the ground prevent a sense of fear from war, internal conflict or serious crime. The second, *justice*, demands that the injustices of the war are remedied and that they are prevented from being repeated in the future, while the final element, *reconciliation*, requires the creation of meaningful relationships of cooperation – on the personal and political levels – between former enemy parties. This definition of peace, which is discussed in detail in Section 4, looks at the concept both from the theoretical and the practical perspectives. On the one hand, it is theoretically sound because it offers arguments in favour of the different elements of peace rather than merely assumes their desirability. Moreover, it elaborates on the inter-relationship of these three elements: striking a balance between them is necessary, because in addition to promoting, they can also contradict with each other. On the other hand, the proposed definition draws from practice in that it is achievable and not all encompassing; it creates clear objectives that ethnically divided societies should be working towards and lays the foundations to explaining how different peacebuilding tools can contribute to their achievement.

## **2. The limited definitional debate on the concept of peace**

The definition of peace can be approached from two directions: either from an abstract point of view which outlines the theoretical qualities of peace, or from a more practical one which examines different peacebuilding methods intended to create a peaceful society. Since this thesis aims to examine the relationship between peace and human rights in *theory* and *practice*, a combined theoretical and practical approach is needed to find an appropriate definition of peace. From the abstract point of view there have been very few contributions as to what we mean by the term. Most of the

literature is concerned with how to make peace technically possible rather than with the logically prior question of what do we mean by peace in the first place.<sup>56</sup> Strazzari recognises this problem when he points out that the concept of ‘sustainable peace’ ‘remains significantly under-theorized: few if any explicit attempts to conceptually discuss it have been recorded.’<sup>57</sup> Similarly, Richmond expresses concern about ‘the fact that there is almost no debate upon peace, its nature, and achievement, other than in the indirect way that would emerge from any discussion about the ending of conflict’.<sup>58</sup>

The limited theoretical analysis that does exist tends to contrast the Latin word for peace, ‘pax’, which is understood as the absence of war, with more holistic concepts such as the Greek ‘eirine’, the Arabic ‘salaam’ and the Hebrew ‘shalom’ which have connotations of well-being, wholeness and harmony.<sup>59</sup> Both of these approaches are unhelpful. On the one hand, simply equating peace with the absence of war misses the positive characteristics of the concept and ignores any further action that has to be taken after the signing of the ceasefire agreement. To quote a seminal UN report, the absence of war ‘can only create a space in which peace can be built’ and is therefore insufficient on its own.<sup>60</sup> On the other, the more inclusive concepts of peace, which have in the last years replaced those that only focus on the absence of war, quickly develop into a description of everything that is good. A typical example of this is Webel’s definition of peace as ‘both a means of personal and collective ethical transformation and an inspiration to cleanse the planet of human-inflicted

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<sup>56</sup> For example, in Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace* (Princeton: Princeton University Press, 2006) at 18, peace is defined as a situation in which ‘a single sovereignty, a Hobbesian Leviathan, has been re-established and exercises a legitimate monopoly of violence’ and at the same time there is at least ‘a minimal degree of political assent and participation’, but the definition of the term is not discussed further. Additionally, Mats Berdal, *Building Peace after War* (Abingdon: Routledge, 2009) at 17-20 offers a definition of ‘post-conflict peacebuilding’ and discusses how best to deal with related issues such as disarmament and governmental legitimacy, but does not explain how we will know that peace has actually been built. Finally, Daniel Philpott and Gerard F. Powers (eds.), *Strategies of Peace: Transforming Conflict in a Violent World* (Oxford: OUP, 2010) at 6-9 propose a ‘strategic peacebuilding’ approach which integrates a number of diverse actors and activities. The authors discuss in detail whether the UN peace operations can be considered ‘successful’, yet offer no definition of that success.

<sup>57</sup> Francesco Strazzari, ‘Between ‘Messy Aftermath’ and ‘Frozen Conflicts’: Chimeras and Realities of Sustainable Peace’, *Human Security Perspectives*, 2 (2008), 45 at 51.

<sup>58</sup> Oliver Richmond, *The Transformation of Peace* (Basingstoke: Palgrave Macmillan, 2006) at 120.

<sup>59</sup> For a discussion of the differences between these concepts, see David P. Barash and Charles P. Webel, *Peace and Conflict Studies* (2<sup>nd</sup> edn.; California: SAGE Publications, 2009).

<sup>60</sup> Panel on United Nations Peace Operations, ‘Report of the Panel on United Nations Peace Operations’, (New York: United Nations, 2000) at [3]. (Henceforth, ‘Brahimi Report’.)

destruction.’<sup>61</sup> However, the broad and idealistic nature of these definitions makes them unhelpful for the purposes of this thesis, which not only focuses on peace in theory, but also in *practice*. In any case, a wide-ranging definition is problematic even if one is solely concerned with a theoretical definition of peace since such broad objectives tend to mean both everything and nothing. Finally, Webel’s assertion that peace can only exist if human-inflicted destruction has been eradicated makes his definition a peculiar bedfellow of human rights, which seek to regulate rather than obliterate violence *per se*.<sup>62</sup>

Of the few authors that have discussed the abstract concept of peace in more detail, Johan Galtung’s work on negative and positive peace stands out. Even though for reasons that are discussed in the next section this initially promising definition of peace should be rejected, Galtung’s theoretical work has been invaluable in making the once controversial, but now widely accepted argument, that peace cannot simply mean the absence of war.<sup>63</sup> Another useful contribution to the definition of peace from a theoretical perspective comes from Pierre Allan, who ranks different types of peace and war along a happiness continuum, with 1 being ‘absolute hell’ and 10 being ‘agape-paradise’.<sup>64</sup> Although Allan’s work is less useful in terms of elucidating the content of peace, it is important because it persuasively illustrates that peace is a matter of degree and not an either/or value. Nevertheless, with the exception of these two contributions, the literature remains largely silent about the theoretical definition of the term.

Similarly, despite the obvious interest peacebuilders should have in defining peace in practical terms, the issue is often left unaddressed, most likely because it is considered as self-explanatory. Typically, the literature engages with the concept only indirectly

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<sup>61</sup> Charles Webel, 'Introduction: Toward a Philosophy and Metapsychology of Peace', in Charles Webel and Johan Galtung (eds.), *The Handbook of Peace and Conflict Studies* (London and New York: Routledge, 2007), 3.

<sup>62</sup> Take for example Article 2 of the European Convention on Human Rights (1950), which does not consider death arising from the use ‘absolutely necessary’ force as being in violation of the right to life.

<sup>63</sup> Contrast for example, the 1962 accepted definition of peace as a condition of ‘*more or less lasting suspension of violent modes of rivalry between political units*’ (Raymond Aron, *Peace and War: A Study of International Relations* (Weidenfeld and Nicolson, 1962) at 151, emphasis in the original) with the current definition of peacebuilding as ‘building on those foundations [of peace] something that is more than just the absence of war.’ (Panel on United Nations Peace Operations, 'Brahimi Report' at [13].)

<sup>64</sup> Allan, 'Measuring International Ethics: A Moral Scale of War, Peace, Justice and Global Care'.

by elaborating on peacebuilding methods that are expected to lead to peace. For example, starting from the premise that '[t]he concept of peace is easy to grasp', *An Agenda for Peace* defines post-conflict peacebuilding as consisting of 'comprehensive efforts to identify and support structures which will tend to consolidate peace'.<sup>65</sup> However, no explanation is forthcoming about why or how such support structures will consolidate peace or what is meant by the term in the first place. Examples of such structures listed in the report include repatriating refugees, monitoring elections, advancing efforts to protect human rights and reforming and strengthening governmental institutions.<sup>66</sup> The long list of peacebuilding methods also generally includes disarmament,<sup>67</sup> the building of memorialisation sites,<sup>68</sup> Truth Commissions,<sup>69</sup> criminal trials<sup>70</sup> and other 'peace enhancing structures',<sup>71</sup> such as the creation of a social free market and an effective and legitimate restorative justice system. Thus, while a lot has been written on peacebuilding methods, there has been no debate as to what qualities peace consists of, leaving peacebuilders with 'no clear idea of what "success" or "failure" actually mean'.<sup>72</sup> Consequently, there is no analysis as to whether and how these peacebuilding methods actually connect and contribute to the intended peace outcome.

Even though authors concerned with practical peacebuilding methods have not directly participated in the definitional debate, they clearly have an implied understanding of peace. Richmond traces the development of the international community's efforts to promote peace over the years and concludes that decisions as

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<sup>65</sup> UN Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992', (New York: United Nations, 1992) at [12] and [55] respectively.

<sup>66</sup> Ibid.

<sup>67</sup> Joanna Spear, 'Disarmament and Demobilisation', in Stephen Stedman, Donald Rothchild and Elizabeth Cousens (eds.), *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, London: Lynne Rienner, 2002), 141.

<sup>68</sup> Brandon Hamber, Liz Ševčenko, and Ereshnee Naidu, 'Utopian Dreams or Practical Possibilities? The Challenges of Evaluating the Impact of Memorialization in Societies in Transition', *International Journal of Transitional Justice*, 4/3 (2010), 397.

<sup>69</sup> Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (London: Routledge, 2011).

<sup>70</sup> Diane F. Orentlicher, 'Setting Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, 100 (1991), 2537.

<sup>71</sup> Luc Reyhler, 'From Conflict to Sustainable Peacebuilding: Concepts and Analytical Tools', in Luc Reyhler and Thania Paffenholz (eds.), *Peace-Building: A Field Guide* (Boulder, London: Lynne Rienner, 2001), 12 at 13.

<sup>72</sup> Keith Krause and Oliver Jütersonke, 'Peace, Security and Development in Post-Conflict Environments', *Security Dialogue*, 36/4 (2005), 447 at 448.

to what peacebuilding methods should be used have been affected by an implied appreciation of the term.<sup>73</sup> Early peacekeeping operations used to focus on keeping combatants separate rather than resolving their differences, because at the time, peace was understood as the absence of violence.<sup>74</sup> Conversely, the current focus on institution building reflects a changing understanding of peace that is essentially liberal in character: it is an embodiment of the expectation that if the institutions that resemble a liberal state are there, then this will necessarily also result in the actual promotion of liberal values.<sup>75</sup> However, conceptualising peace as consisting of institutions rather than values means that 'the question of what peace might be expected to look like from the *inside* (from within the conflict environment) is given less credence than the way the agents of intervention desire to see it from the *outside*'.<sup>76</sup> Therefore, an institutional definition of peace is inappropriate for the purposes of this thesis for two reasons: first, despite the fact that it is couched in liberal terms, it ignores the undoubtedly important social and human consequences of peacebuilding. Second, the definition's strong emphasis on institutions, including those promoting the protection of human rights, is particularly problematic if the aim is to examine the relationship between peace and rights in the first place.

It seems that over time, peace studies pull in two different directions: on the one hand, the underdeveloped abstract concept of peace becomes more idealistic and utopian. On the other, the peacebuilders' confidence that their undefined and unarticulated peace is achievable as long as a liberal recipe is followed, is increasing. Ultimately, peace is an 'essentially contested concept', meaning that there are internally complex disagreements about some of its key aspects.<sup>77</sup> The best one can do is to advocate a conception of peace and by defending it against rival conceptions, to advance the quality of argumentation about it. It is this absence of argumentation that is the source of a number of problems. First, the lack of well-articulated conceptions of peace has created a tendency to use an adjective to briefly describe each author's perception of

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<sup>73</sup> Richmond, *The Transformation of Peace*.

<sup>74</sup> *Ibid.*, at 89-90.

<sup>75</sup> Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: CUP, 2004).

<sup>76</sup> Oliver Richmond, 'The UN and Liberal Peacebuilding: Consensus and Challenges', in John Darby and Roger Mac Ginty (eds.), *Contemporary Peacemaking* (2<sup>nd</sup> edn.; New York: Palgrave Macmillan, 2008), 257 at 261 (emphasis in the original).

<sup>77</sup> Walter Bryce Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society*, 56 (1955-1956), 167-198.

peace. The literature now consists of references to stable,<sup>78</sup> (self-) sustainable,<sup>79</sup> just,<sup>80</sup> liberal,<sup>81</sup> and real peace.<sup>82</sup> This however, has not been coupled with an appreciation of how each adjective changes what is meant by peace: do, for example, the adjectives ‘sustainable’ and ‘stable’ describe the same desirable characteristics of the concept in practice? This is a matter of practical importance since at different places in the UN Brahimi Report there are references to stable and to sustainable peace.<sup>83</sup> Furthermore, it is unclear on a theoretical level whether these adjectives refer to different characteristics of the same conception of peace, or whether they signify the existence of different conceptions.

The second danger created by the absence of proper argumentation about the definition of peace is that peacebuilding measures, such as human rights protection, could be promoting a different type of peace than the one peacebuilders are assuming they are working towards. Third, even if peacebuilding measures are contributing to the intended outcomes, if the ultimate objective is not well defined, then it is unclear whether it has in fact been achieved or whether further measures are needed for its completion. It therefore transpires that the lack of a proper definition of peace leaves the whole peacebuilding literature poorer and makes the objective of determining the relationship between it and human rights impossible. The following section examines the best-developed attempt to define peace in the literature and offers arguments to explain why, despite its promising starting point, it should be rejected.

### **3. Galtung’s peace and the difficulties of applying it in practice**

The main thesis advocated by Johan Galtung is that peace cannot simply mean the absence of war (what he calls ‘negative peace’) because such a definition does not

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<sup>78</sup> Kenneth Ewart Boulding, *Stable Peace* (Austin; London: University of Texas Press, 1978).

<sup>79</sup> Strazzari, 'Between ‘Messy Aftermath’ and ‘Frozen Conflicts’: Chimeras and Realities of Sustainable Peace'.

<sup>80</sup> Pierre Allan and Alexis Keller (eds.), *What Is Just Peace?* (Oxford: OUP, 2006).

<sup>81</sup> This is currently the most popular characterization of peace. Despite the fact that the UN does not explicitly characterise the peace it is working towards as ‘liberal’, this is suggested by the peacebuilding methods it has adopted since the end of the Cold War. (See, Paris, *At War’s End: Building Peace after Civil Conflict*; Richmond, *The Transformation of Peace*; Philpott and Powers (eds.), *Strategies of Peace: Transforming Conflict in a Violent World*.).

<sup>82</sup> Richard Nixon, *Real Peace* (London: Sidgwick & Jackson, 1983).

<sup>83</sup> Panel on United Nations Peace Operations, 'Brahimi Report' at [87] and [22] respectively.

adequately capture the whole range of issues that peace studies should be concerned with.<sup>84</sup> In addition, we should focus on ‘positive peace’, a concept that was developed over time to mean the building of positive relationships between previously warring parties. Thus, for Galtung, peace consists of both negative and positive peace. The fact that part of his theory rests on the elimination of violence makes it intuitively appealing since that is every peacebuilder’s primary goal. At the same time, its broader emphasis on positive relations adds sophistication, a characteristic that is missing from wholly negative accounts. Most scholars, accepting Galtung’s as the most authoritative account of peace, adopt it without much analysis or criticism, thus partly explaining the lack of a definitional debate on the concept.<sup>85</sup>

Galtung defined peace as the absence of violence and argued that violence is present when an individual cannot achieve his full potential due to his surrounding conditions.<sup>86</sup> The most obvious example of violence is physical, or ‘*direct violence*’, which is the intentional causing of harm from one person to the other. Clearly, if a person’s potential is to live approximately to the age of 80, but he is killed during a war when he is 25, his ‘potential realizations’ have been limited.<sup>87</sup> Originally, Galtung argued that the absence of direct violence was negative peace, but that a complete theory of peace also required the absence of structural and cultural violence, what he called ‘positive peace’.<sup>88</sup> *Structural violence* is caused indirectly if a person limits another’s potential simply by doing the job prescribed to him by an unfair structure. An example of such a structure was apartheid South Africa, where discrimination against blacks considerably reduced their potential to achieve what they wanted. The third type of violence, *cultural violence*, exists when people use their history, trauma and myths to excuse or justify direct or structural violence.<sup>89</sup> A classic example of this is nationalistic propaganda portraying the ‘other’ as less than human. Such attitudes are violent both because they are harmful in themselves and because they excuse or justify the other two types of violence, thus making their occurrence even more likely.

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<sup>84</sup> Galtung, 'An Editorial'.

<sup>85</sup> See for example, Barash and Webel, *Peace and Conflict Studies* (2<sup>nd</sup> ed.). Also see, Pierre Allan, 'Measuring International Ethics: A Moral Scale of War, Peace, Justice and Global Care', in Pierre Allan and Alexis Keller (eds.), *What Is Just Peace?* (Oxford: OUP, 2006), 90.

<sup>86</sup> Johan Galtung, 'Violence, Peace and Peace Research', *Journal of Peace Research*, 6/3 (1969), 167 at 168.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid., at 183.

<sup>89</sup> Johan Galtung, 'Cultural Violence', *Journal of Peace Research*, 27/3 (1990), 291.

Through this expanded definition of violence, Galtung persuasively illustrated that peace was absent in societies, which were not suffering from considerable physical violence, yet were only superficially calm.

The problem with defining positive peace as the *absence* of structural and cultural violence is that this is not really a positive conception of peace at all, but rather, a sophisticated account of negative peace. Thus, even though Galtung did not explicitly reject his previous definition of peace, he gradually came to view positive peace as the creation of direct peace, cultural peace and structural peace.<sup>90</sup> Now, negative peace was the absence of all kinds of violence and positive peace consisted of these more positive values.<sup>91</sup> Galtung contended that violence resulted from untransformed conflicts within a society: incompatible goals between groups can lead to them becoming blocked, which then results into frustration and polarisation between the parties.<sup>92</sup> Unless that polarisation is dealt with, it leads to the dehumanisation of the other and eventually to violence. As soon as one type of violence erupts, the other two become even more likely, thus creating a vicious cycle of violence. In order for this to stop, it is both necessary to eliminate violence (negative peace) and to introduce positive values which will make society capable of transforming future conflicts and preventing violence (positive peace).

Galtung's theory is persuasive because it acknowledges that physical violence does not simply start without any underlying problems. This leads to the correct conclusion that merely stopping physical violence will be inadequate since if the underlying problems remain unaddressed, they will eventually resurface again. Ultimately however, Galtung's theory should be rejected because its lack of clarity about a number of key assertions makes its practical application impossible. In particular, the conceptualisation of negative peace is problematic for two reasons: first, it is unclear

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<sup>90</sup> The articles in which Galtung originally developed his theory were still cited in Johan Galtung, 'Peace, Positive and Negative', in Daniel J. Christie (ed.), *The Encyclopedia of Peace Psychology* (Chichester: Wiley-Blackwell, 2012), 758.

<sup>91</sup> Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (London: Sage, 1996) at 32.

<sup>92</sup> Johan Galtung, 'Introduction: Peace by Peaceful Conflict Transformation – the TRASCEND Approach', in Charles Webel and Johan Galtung (eds.), *The Handbook of Peace and Conflict Studies* (London and New York: Routledge, 2007), 14. While Galtung's final conclusions are ultimately rejected, his starting point – that peace is based on successful conflict management – is persuasive and is taken up again in Chapter 5, Section 2.



whether it requires the complete elimination or simply the reduction of violence; and second, determining whether structural violence exists is complicated by Galtung's unsatisfactory definition of the term. Equally problematic is Galtung's understanding of positive peace, which rests on a number of undefined values, which have not been sufficiently linked to peacebuilding measures on the ground. Finally, questions are raised as to whether the concepts of negative and positive peace are as distinct as Galtung asserts and whether anything is achieved by maintaining this distinction today.

Galtung frequently refers to the 'absence of violence' as a necessary condition for negative peace, but it is unclear whether this requires the elimination or the reduction of violence.<sup>93</sup> While in 1969 he urged readers to 'imagine we were able to calculate the losses incurred by the two forms of violence [...] if they could be *eliminated*',<sup>94</sup> in 1985 he referred to peace as the '*reduction* of violence'.<sup>95</sup> More recently, Galtung defined negative peace as consisting of 'processes of violence reduction',<sup>96</sup> yet in the same text and almost immediately after, he concluded that '*Negative peace is the absence of violence of all kinds.*'<sup>97</sup> On the one hand, the choice of the word 'absence' suggests that negative peace requires the complete elimination of violence, something supported by the fact that Galtung never describes or mentions a threshold under which violence has been adequately reduced to make the society a peaceful one. On the other, requiring the complete elimination of violence is impossible, since different types of violence can be reduced by using potentially conflicting methods. For instance, direct violence could potentially be eradicated by convicting someone of a crime without an opportunity to defend himself or obtaining evidence through torture. However, even if this reduced direct violence, it would have been achieved by increasing structural violence, thus undermining Galtung's main thesis that peace should be achieved through peaceful means. The danger of this approach was acknowledged by Galtung himself. He pointed out that attempting to control violence

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<sup>93</sup> Galtung, 'An Editorial' at 2; Galtung, 'Violence, Peace and Peace Research' at 167, 168 and 172; Johan Galtung, 'Twenty-Five Years of Peace Research', *Journal of Peace Research*, 22/2 (1985), 141 at 145.

<sup>94</sup> Galtung, 'Violence, Peace and Peace Research' at 182 (emphasis in the original). The reference to 'two forms of violence' is because he only introduced the concept of cultural violence later, in 1990.

<sup>95</sup> Galtung, 'Twenty-Five Years of Peace Research' at 151 (my emphasis).

<sup>96</sup> Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* at 30.

<sup>97</sup> *Ibid.*, at 31 (emphasis in the original).

in this way could easily turn into a political disaster.<sup>98</sup> Thus, despite some evidence to the contrary, when Galtung refers to the absence of violence, he arguably means reducing and keeping it under control rather than eliminating it completely. Yet, his theory offers no way of knowing when violence has been sufficiently reduced and peace has been built, thus making it difficult to apply in practice.

The second problem with Galtung's negative peace is that the definition of structural violence remains ambiguous. A situation is structurally violent if it reduces a person's 'potential realizations', yet it is unclear what that means exactly. Galtung argues that there are two types of potential realisations: somatic and mental realisations. Presumably, a person's somatic realisations are undermined if he is physically detained, has to stay in bed due to an illness or does not have enough to eat. However, a person's mental realisations are harder to define; Galtung states that in order for something to be considered a mental realisation, its value must be 'fairly consensual' and accepts that this test might be difficult to apply because of disagreements as to consensus.<sup>99</sup> For example, even though the value of literacy is accepted as important almost everywhere, the value of being a Christian is not. However, it is not clear why the 'fairly consensual' test should play such an important role in determining what is a mental realisation. Imagine a society ruled by a dictator who does not allow any political dissent, but makes sure that his people live comfortably. Consequently, most of his subjects agree that they are willing to sacrifice their freedom of speech; there is in other words, a fairly consensual decision that freedom of speech is not valuable in their society. Is it the case then that this dictatorship is not structurally violent?

The definition of positive peace is equally unclear since it consists of a number of positive values, which however remain undefined and without a clear link to the peacebuilding measures on the ground. Galtung argues that positive peace is achieved through 'processes of life enhancement'<sup>100</sup> and more specifically, a 'culture of peace, confirming and stimulating an equitable economy and an equal polity.'<sup>101</sup> However, it is unclear what each of these phrases means. Galtung simply states that the field of

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<sup>98</sup> Galtung, 'Introduction: Peace by Peaceful Conflict Transformation – the TRASCEND Approach' at 22.

<sup>99</sup> Galtung, 'Violence, Peace and Peace Research' at 169.

<sup>100</sup> Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* at 30.

<sup>101</sup> Galtung, 'Peace, Positive and Negative' at 759.

‘equity of the economy’ is theoretically and practically very undeveloped, with the International Covenant on Economic Social and Cultural Rights being a step towards its achievement. Alternatively, ‘equality of the polity’ is where democracy and human rights enter, not only within countries, but also among them.<sup>102</sup> Yet, the broadness and vagueness of these definitions leave the reader wondering what exactly needs to be done in order to promote positive peace on the ground. Moreover, it is unclear how these positive values can be achieved and how they connect to peace exactly. For example, Galtung states that direct positive peace consists of ‘verbal and physical kindness’, the epitome of which is love, ‘a union of bodies, minds and spirits.’<sup>103</sup> However, arguably such feelings are impossible among strangers generally, let alone between enemy groups in post-conflict societies. Similarly, Galtung associates structural positive peace with values such as integration, solidarity and participation and cultural positive peace with democracy, human rights, peace education and peace journalism.<sup>104</sup> Again though, he does not explain how these general principles can be promoted by peacebuilding measures on the ground and in what way exactly. It seems therefore that despite Galtung’s assertions that peace should ‘refer to something attainable and also in fact attained, not to something utopian’, his is mainly an idealistic account of peace, with little application in practice.<sup>105</sup>

The broadness and lack of clarity of Galtung’s definitions raise questions as to where negative peace stops and positive peace begins – and, indeed, whether the distinction between the two is still helpful today. Galtung lists a number of necessary steps for the achievement of negative peace, including forging a dialogue in order for parties to bridge their legitimate goals and creating a peace structure consisting of equality, equity and reciprocity among people.<sup>106</sup> He then contends that when such steps are taken, there will be negative peace, but positive peace will still be missing, thus raising questions about the peacebuilding measures he has in mind for each type of peace. Arguably, promoting equality or starting a dialogue between the parties are positive steps towards promoting peaceful relations among the ex-combatants, rather than simply ensuring the elimination of violence between them. In other words, it is

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<sup>102</sup> Galtung, 'Introduction: Peace by Peaceful Conflict Transformation – the TRASCEND Approach', endnotes 2 and 3 at 32.

<sup>103</sup> Ibid., at 32.

<sup>104</sup> Ibid.

<sup>105</sup> Galtung, 'Violence, Peace and Peace Research', at 185.

<sup>106</sup> Galtung, 'Introduction: Peace by Peaceful Conflict Transformation – the TRASCEND Approach'.

unclear why these methods are intended to achieve negative, but not positive peace and, indeed, why such a distinction is still valuable. A definition of peace that focuses on six objectives (the achievement of negative and positive peace with a direct, structural and cultural component for each) and which includes different methods for achieving each of them is unnecessarily complex. While a definition of peace should be theoretically coherent, its true value comes from its application on the ground, thus suggesting that Galtung's unclear and vague definition should be rejected.

#### **4. Forging a new definition of peace**

Having rejected Galtung's theory, this chapter offers an alternative definition of peace, consisting of security, justice and reconciliation, which is easier to apply in practice. These concepts will be discussed in detail in the three following sub-sections, but a brief summary of each is necessary at this stage. Security exists when the conditions on the ground prevent a sense of fear from war, internal conflict or serious crime. Justice, the second element of peace, demands that the injustices of the war are remedied and that they are prevented from being repeated in the future. Finally, reconciliation requires the creation of meaningful relationships of cooperation – on the personal and political levels – between former enemy parties. The longer these elements exist together, the more peaceful the society becomes.

The definition of peace consisting of these three elements has been derived from a careful examination of the theoretical literature and of the peacebuilding practice in ethnically divided, post-conflict societies. For example, the importance of security has been highlighted in the literature on disarmament<sup>107</sup> and police reform<sup>108</sup> and has also been acknowledged by Boulding who argues that 'stable peace is a situation in which the probability of war is so small that it does not really enter the calculations of the people involved'.<sup>109</sup> At the same time, its significance is illustrated in practice through the passing of international treaties, such as the Anti-Personnel Landmines Convention 1997 and the emphasis paid to security operations in various post-conflict

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<sup>107</sup> Spear, 'Disarmament and Demobilisation'.

<sup>108</sup> Charles T. Call and William Stanley, 'Civilian Security', in Stephen Stedman, Donald Rothchild and Elizabeth Cousens (eds.), *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, London: Lynne Rienner, 2002), 303.

<sup>109</sup> Boulding, *Stable Peace* at 13.

countries. For instance, the United Nations Peacekeeping Force in Cyprus (UNFICYP), one of the longest-standing UN operations in the world, has been stationed in Cyprus since 1964 in order to preserve security and prevent further violence between Greek and Turkish Cypriots.<sup>110</sup>

The second element of peace, justice, is also frequently mentioned as being key in the literature. For example, Allan argues that we should be working towards 'Just Peace', which he defines as 'stable peace with justice',<sup>111</sup> and numerous authors have attempted to define what we mean by justice in post-conflict contexts.<sup>112</sup> The justification behind such attempts has generally been that 'the absence of justice is often the primary reason for the absence of peace'.<sup>113</sup> In practice, the emphasis on justice has been reflected through the creation of the International Criminal Court and other special international criminal tribunals, the remedying of people displaced from their homes and the emphasis on reforming judicial systems. Finally, the third element of peace, reconciliation, is considered increasingly important and has resulted in a rich literature discussing how truth commissions<sup>114</sup> and other reconciliation methods, such as peace education<sup>115</sup> and peace journalism,<sup>116</sup> can promote peace. The growing literature on reconciliation also includes discussions of related theoretical concepts, such as trust,<sup>117</sup> forgiveness,<sup>118</sup> empathy and the rehumanisation of the enemy.<sup>119</sup> Examples of its practical importance in ethnically divided, post-conflict societies include the workings of the Truth and Reconciliation Commission in South

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<sup>110</sup> United Nations Security Council Resolution (UNSCR) 186 (4 March 1964) at [5].

<sup>111</sup> Allan, 'Measuring International Ethics: A Moral Scale of War, Peace, Justice and Global Care' at 115.

<sup>112</sup> Justice in post-conflict contexts is usually referred to by the catchall phrase of 'transitional justice' with Teitel offering one of the most popular definitions of the term. (Ruti G. Teitel, *Transitional Justice* (Oxford: OUP, 2000) at 9.)

<sup>113</sup> Michelle Parlevliet, 'Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management', *Track Two Occasional Paper* 11(1) (Cape Town: Centre for Conflict Resolution, March 2002), 1 at 11.

<sup>114</sup> Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*.

<sup>115</sup> Hamber, Ševčenko, and Naidu, 'Utopian Dreams or Practical Possibilities? The Challenges of Evaluating the Impact of Memorialization in Societies in Transition'.

<sup>116</sup> Lisa J. Laplante and Kelly Phenicie, 'Media, Trials and Truth Commissions: 'Mediating' Reconciliation in Peru's Transitional Justice Process', *International Journal of Transitional Justice* 4 (2010), 207.

<sup>117</sup> Trudy Govier and Wilhelm Verwoerd, 'Trust and the Problem of National Reconciliation', *Philosophy of the Social Sciences*, 32/2 (2002), 178.

<sup>118</sup> Russell Daye, *Political Forgiveness: Lessons from South Africa* (Maryknoll, N.Y.: Orbis Books, 2004).

<sup>119</sup> Halpern Jodi and Harvey M. Weinstein, 'Empathy and Rehumanization after Mass Violence', in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: CUP, 2004), 303.

Africa and the adoption of inter-ethnic workshops and joint community projects in Bosnia and Cyprus.

The elements' importance is also confirmed when they are compared with Galtung's three types of violence. Although the two definitions are different, there is a clear connection between the element of security and the absence of direct violence, the element of justice and the absence of structural violence and the element of reconciliation and the absence of cultural violence. These connections notwithstanding, the proposed definition's main distinguishing feature from Galtung's is that it leaves space for the positive qualities that a peaceful society must possess, while simultaneously remaining achievable. For example, security varies from the absence of direct violence because in order to be achieved, it requires additional steps, such as effective disarmament of ex-combatants and the proper training of the police. Similarly, justice is a different concept than the absence of structural violence because it also imposes positive, but realistic obligations on the state: remedying past injustices and ensuring that they are not repeated in the future. Finally, a divided society is not reconciled simply because negative feelings against other ethnic groups are not uttered out loud (the absence of cultural violence). Reconciliation, which involves building positive relationships between people, requires cooperation among parties, which does not naturally occur even when cultural violence is eliminated. Nevertheless, while the three elements are broader than negative peace, they also avoid the lack of clarity, broadness and utopian nature of Galtung's positive peace.

Attention has been paid to security, justice and reconciliation both in the literature and in practical peacebuilding mechanisms, but there has not been a concerted effort to examine how the three elements connect together to create peaceful societies. However, understanding one of the elements independently from the other two and discussing what peacebuilding mechanisms can promote each of them in isolation is unsatisfactory because it ignores key links between the elements themselves and between them and the ultimate aim of peace. Security, justice and reconciliation are distinct, and different methods and tools are available to peacebuilders for their achievement. Nonetheless, they are also connected in that the promotion of one could make the achievement of the others more likely. For example, as the situation in a post-conflict society becomes more secure, justice becomes easier to administer, since

cases can be decided on their merits, rather than the power of the parties. This was the case in Bosnia, where shortly after the war, the domestic judiciary was reluctant to find that the dominant ethnic group in each entity was still acting in a discriminatory manner against the members of the other two.<sup>120</sup> Twenty years after the war, and with the possibility of returning back to violence being a distant one, judges have become more willing to decide cases neutrally.<sup>121</sup> Similarly, justice and reconciliation are connected because remedying past injustices and ensuring that they will not be repeated in the future makes the climate for reconciliation more hospitable. Equally important is the positive relationship between security and reconciliation because only if the people can leave the fear of the conflict behind them can they start trusting and cooperating with the other. As the Brahimi Report well put it, a 'relatively less dangerous environment [...] is a fairly forgiving one.'<sup>122</sup>

However, while these connections between the different elements should be made explicit, the definition of peace also largely rests on the possible tension between them, hence the need to balance them against each other.<sup>123</sup> For instance, justice might demand that all perpetrators are punished for their actions, which could in turn, result in increased tension between the two communities and even lead to renewed violence. Similarly, trials, which by their nature result in clear winners and losers, can also damage reconciliation efforts. This undermining of reconciliation through attempts to promote justice is vividly illustrated through the effects of the International Criminal Tribunal in Former Yugoslavia (ICTY) in Bosnia: nationalist politicians have hijacked the Tribunal's judgments and used them as 'evidence' that the international community is biased against them and favours the 'others'.<sup>124</sup> The

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<sup>120</sup> Sheri P. Rosenberg, 'Equality after Genocide: Jurisprudence of the Legal Institutions Established in Dayton's Bosnia', in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and the Rule of Law in Postwar Bosnia and Herzegovina* (Surrey: Ashgate, 2008), 115.

<sup>121</sup> Compare the Bosnian Constitutional Court cases *U-5/98 (3<sup>rd</sup> Partial Opinion)* (1 July 2000, BiH CC) with *U-44/01* (27 February 2004, BiH CC).

<sup>122</sup> Panel on United Nations Peace Operations, 'Brahimi Report' at [25].

<sup>123</sup> This tension is particularly apparent in the early stages of the peacebuilding process when the ethnic groups are least willing to depart from their positions on a given issue and compromise with each other. The consequences of this phenomenon are discussed in more detail in Chapter 5.

<sup>124</sup> Rachel Kerr, 'The Road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the Politics of War Crimes in Bosnia', *European Security*, 14/3 (2005), 319. Kerr quotes at 325 a 2002 study based on interviews with 10,000 people showing that of the participants found in the Federation of Bosnia and Herzegovina, 51% trusted the ICTY, while in the Republika Srpska only 4% did. This is because the ICTY is presented by Serb politicians and perceived by the public as 'anti-Serb', despite the fact that even the most cursory glance through its list of indictments would confirm that it has indicted criminals of all ethnic groups.

need to find an equilibrium between the elements of peace has also been recognised by the UN, which argued that '[a]t times, the goals of justice and reconciliation compete with each other. Each society needs to form a view about how to strike the right balance between them.'<sup>125</sup>

As a result of the possible tension between the three elements, absolute security, justice and reconciliation are unattainable and unnecessary for peace to be built. Instead, all three must meet a certain threshold and, after that is satisfied, they should be balanced against each other so that the maximum of each can be achieved without undermining the other elements. It is always hard to abstractly define how much of each element is enough, but, upon inspection, it is possible to determine whether a given society is sufficiently secure, just or reconciled based on the facts on the ground. When the balance between the three elements has been struck, the longer it is maintained the more peaceful that society becomes for two reasons.<sup>126</sup> First, peace itself increases the resilience of a peaceful society. Although soon after the war the parties might feel they can benefit more if they continue fighting, the longer peace persists, the more likely they are to want to continue enjoying the benefits conferred by it, to which they are now accustomed. Second, peace becomes more durable because over time the society in question will have successfully resolved a number of divisive conflicts, thus making the management of subsequent ones easier to achieve.

The importance of balancing the three elements and maintaining a satisfactory threshold of each in post-conflict, ethnically divided societies is illustrated through the case of Cyprus. Despite the relatively secure conditions on the island, Cyprus is not peaceful because security has been achieved to the detriment of the other two elements. The physical separation of Greek and Turkish Cypriots reduces the possibility of violence between them, but also prevents inter-community communication and undermines reconciliation. Moreover, although the two sides maintain security by refraining from violence, they undermine justice because neither has taken effective steps to remedy the injustices of the war and prevent future ones from materialising. Peace in Cyprus will be achieved when the two communities pay

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<sup>125</sup> UN Secretary-General, 'Press Release, Secretary General Expresses Hope for New Security Council Commitment to Place Justice, Rule of Law at Heart of Efforts to Rebuild War-Torn Countries', (2003) on <http://www.unis.unvienna.org/unis/pressrels/2003/sgsm8892.html> [accessed 6 June 2014].

<sup>126</sup> Boulding, *Stable Peace* at 62.



sufficient attention to reconciliation and justice, even if steps in this direction undermine security to a certain degree. This happened to a certain extent during the opening of the Green Line, the de facto border that separates the two communities, in 2003: the mixing of the ethnic groups for the first time in 40 years raised concerns about violent skirmishes, which were nevertheless, overshadowed by reconciliation-promoting stories of warm encounters between old friends and neighbours.

The definition offered here results in a dynamic conception of peace. It promotes a balance between the three elements by appreciating that peace is not a state of bliss, but exists in a society where manageable conflicts are dealt with. No diverse society, let alone an ethnically divided one, is conflict-free; what is important therefore is not that disagreements are eliminated, but that they are handled in a way that respects the interests of the different groups. This is made easier by the fact that the proposed definition draws a clear line between peace, its elements and the peacebuilding measures that promote them. Where different elements of peace contradict, difficult decisions will still have to be made, but at least, they will be made transparently. Furthermore, the specific balance that will have to be struck between the three elements changes depending on the context in which the tension arises. It might for example be the case that in a conflict between security and justice in Cyprus, the latter should be given priority, but where such a conflict arises in South Africa, with its high crime rates, a different decision should be taken. Thus, an additional advantage of this definition is that it acknowledges that the context of different post-conflict societies affects the peacebuilding decisions that will have to be taken for each. This is in contrast to the current peacebuilding practices, which assume that all post-conflict societies can be 'saved' by using the same liberal recipe of democratisation and economic liberalisation.

The lack of a satisfactory definition of peace has left peacebuilders in the dark about what it is that they are working towards, whether they can in fact achieve it and what steps they should adopt to get there. This section has attempted to fill this gap by arguing that peace consists of three elements – security, justice and reconciliation – which sometimes reinforce and sometimes contradict with each other. This definition is advantageous over the one other serious attempt that has been made to describe peace because unlike it, it is clear, practically achievable and relevant to different

societies around the world. The aim of the following sub-sections is not to give an exhaustive definition of each of the three elements, but to explain how they link to peace in ethnically divided, post-conflict societies and identify some methods and tools that can be used to promote them.

#### **(a) Security as the first element of peace**

The first element within the proposed definition of peace is security, which exists when the conditions on the ground prevent feelings of fear from war, internal conflict or serious crime. Security from physical threats is essential to any definition of peace because people's first concern during and after a conflict is their physical well-being. As Doyle and Sambanis put it, 'The first step is security. A secure environment is the *sine qua non* of the new beginning of peace.'<sup>127</sup> Illustrative of this is the case of Cyprus: violent conflict has not broken out on the island during the last 40 years and has even been avoided during the decade when the Green Line was opened and members of both communities made contact with each other for the first time since the 1960s. Yet, despite these relatively secure conditions, more than 70% of Greek and Turkish Cypriots believe that security should be the 'highest priority item' during the peace negotiations.<sup>128</sup> Lack of security makes it impossible for people to plan their future and put the conflict behind them due to concerns that any attempts to do so will be undermined by more violence in the near future. Even today, a decisive factor in important decisions for Cyprus' future is Turkey's likely reaction and the extent to which this is likely to undermine security on the island.<sup>129</sup> A society, which operates under such constant threats, is always in a state of emergency and until they are dismissed, it cannot be entirely peaceful.

Until the end of the Cold War, the clear answer to whom security was for, was the state, since an assumption was made that if the state was secure, so were its subjects.<sup>130</sup> This traditional understanding of the concept was rightly challenged in a

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<sup>127</sup> Doyle and Sambanis, *Making War and Building Peace* at 338.

<sup>128</sup> Alexandros Lordos and Erol Kaymak, 'Public Opinion and the Property Issue: Quantitative Findings', (Cyprus: Interpeace, 2010).

<sup>129</sup> See, for example, the current debate on exporting hydrocarbons recently discovered in Cyprus through Turkey and the negative publicity this has created among Greek Cypriots due to security concerns. (International Crisis Group, 'Aphrodite's Gift: Can Cypriot Gas Power a New Dialogue?', (Nicosia/Instabul/Brussels: International Crisis Group, 2012) at 15-16.)

<sup>130</sup> Barbara Von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Oxford and Portland, Oregon: Hart Publishing, 2007) at 9.

1994 United Nations Development Programme (UNDP) Report which argued in favour of a new, 'human security' ideal that focused on individuals instead of states.<sup>131</sup> The report rejected the traditional approach since threats to people's security come, not only from other states, but also from non-state actors or the state itself. Making the state more secure and powerful does not always result in the increased protection of its subjects and can even have the reverse effect. The human security definition is particularly important when defining security as one of the elements of peace in post-conflict, ethnically divided societies, where the state was at least until recently trying to protect only some of its citizens and was turning against the rest. Thus, a necessary element for peace is the security of all the individuals residing in the state, irrespective of their ethnic group or connections with the government.

Perhaps the question that has generated the most debate in the security literature concerns the types of threats people must be protected from. The UNDP Report adopted an excessively broad approach arguing that the notion of security is 'all-encompassing' and that 'most' of the threats that fall under the heading of human security can be considered under seven categories: (i) economic security (freedom from poverty); (ii) food security (physical and economic access to food); (iii) health security; (iv) environmental security; (v) personal security (physical safety); (vi) community security (survival of traditional cultures and ethnic groups); and (vii) political security (enjoyment of civil and political rights).<sup>132</sup> The Report states that the categories are interconnected since a threat of one type can influence all forms of human security. However, such a broad definition is problematic because the causes of and ways to deal with physical threats are very different from those concerning other dangers. The only reason for including different types of threats under the single concept of security was to send the message that governments should prioritise other policy areas, aside from physical security, as well. Nevertheless, the very broadness of the term defeats this purpose because by prioritising everything, we are prioritising nothing.<sup>133</sup> Furthermore, an all-inclusive definition of security suggests that there are no limits to the concept's expansion, illustrated by the fact that despite the UNDP's broad definition, scholars have suggested additional threats that should be dealt with

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<sup>131</sup> UNDP, 'Human Development Report: Annual Report', (New York: UNDP, 1994).

<sup>132</sup> Ibid., at 24.

<sup>133</sup> Keith Krause, 'The Key to a Powerful Agenda, If Properly Delimited', *Security Dialogue*, 35/3 (2004), 367.

under the security label. For example, Reed and Tehranian also argue for the protection of psychological security (involving conditions establishing respectful, loving and humane interpersonal relations) and communication security (concerning freedom and balance in information flows).<sup>134</sup> However, ‘the broad vision of human security is ultimately nothing more than a shopping list. [...] At a certain point, human security becomes a loose synonym for “bad things that can happen”’, thus losing its useful purpose as a single concept.<sup>135</sup>

Instead, a narrower definition of human security, which focuses on protecting people only from physical threats, should be adopted. Such threats could be the result of war, internal conflict or serious crime such as gang violence, which tends to increase after the war has ended.<sup>136</sup> Physical security should be singled out from the seven UNDP categories first, because it is the most directly related to post-conflict contexts and second, because a narrower definition of the term makes it more practically useful. The importance of physical security was highlighted by the UNDP itself which stated that ‘[p]erhaps no other aspect of human security is so vital for people as their security from physical violence.’<sup>137</sup> Furthermore, the broad nature of the UNDP’s definition was even criticised by Canada, one of the most enthusiastic supporters of the concept of human security, for undermining the importance of human insecurity resulting from violent conflict.<sup>138</sup> An all-inclusive definition could imply that physical security is almost easy to guarantee, especially when compared to categories such as environmental or health security which are not completely within human control. In contrast, a narrow definition allows policy makers to clearly identify the issues that must be dealt with for security to be achieved and connect them with peacebuilding policies on the ground. This leads to the next question, namely, the type of policies that have to be adopted in order to promote security in real-life terms.

Security is not achieved simply because the war has stopped; it can still be undermined due to several reasons: because further violence is likely, as was the case

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<sup>134</sup> Laura Reed and Majid Tehranian, 'Evolving Security Regimes', in Majid Tehranian (ed.), *Worlds Apart: Human Security and Global Governance* (London: I.B. Tauris, 1999), 23.

<sup>135</sup> Krause, 'The Key to a Powerful Agenda, If Properly Delimited' at 367.

<sup>136</sup> Call and Stanley, 'Civilian Security'.

<sup>137</sup> UNDP, 'Human Development Report: Annual Report' at 30.

<sup>138</sup> Canadian Department of Foreign Affairs and International Trade, 'Human Security: Safety for People in a Changing World', (Ottawa: Government of Canada, 1999) at 2.

in Bosnia shortly after the war; because there has been an increase in crime rates, such as in South Africa; or because of a popular belief that the enemy may still pose a threat, as is the case in Cyprus. As a result, different societies are likely to need different security-promoting measures. Dilemmas as to how to achieve security in practice exist both in the short and the long-term after a conflict. A short-term security dilemma concerns the process and timing of disarmament; this is a delicate decision because on the one hand, ex-combatants should be disarmed early on in order to make people feel safe. On the other, disarmament should not take place too soon because ex-fighters might be afraid that they are losing their power with nothing in return, thus being encouraged to act as spoilers.<sup>139</sup> The stakes are high because if the process fails, citizens may suffer from 'microinsecurity', where individuals fear that they will be the victims of crimes perpetrated by former soldiers, or 'macroinsecurity' which is the fear that the state might be overthrown by insurrection.<sup>140</sup> On the other hand, an example of a long-term security dilemma is the reform of the police, not always a priority issue in post-conflict societies, but one that can still affect the peacebuilding efforts. A legitimate and properly working police force is more likely to make people feel confident that physical threats will be dealt with and that the police themselves will not cause further unrest.

The final question that has to be asked with regards to security relates to the mechanics of the definition of peace proposed here and is concerned with how much security is necessary in a given society and at what cost. It is wrong to assume that little security is really no security; rather, security is a matter of degree and peacebuilders should be concerned with how much of it is enough.<sup>141</sup> This is because security has a cost, not only in financial terms, an important factor in post-conflict societies, but also in terms of undermining justice and reconciliation. A minimum level of security is needed, but how much is desirable beyond that depends on how much already exists in a given society. So, if people are relatively secure, they might prefer to spend their energy and resources on something else, even if investing in security could have increased it a bit more.<sup>142</sup> Therefore, optimum security is

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<sup>139</sup> Spear, 'Disarmament and Demobilisation'.

<sup>140</sup> Paul Collier, 'Demobilization and Insecurity: A Study in the Economics of the Transitions from War to Peace', *Journal of International Development*, 6/3 (1994), 349.

<sup>141</sup> David Baldwin, 'The Concept of Security', *Review of International Studies*, 23 (1997), 5.

<sup>142</sup> Ibid.

achieved when physical safety exists to the greatest degree that is practically possible without compromising justice and reconciliation.

### **(b) Justice as the second element of peace**

Justice, the second element of peace, is defined here in a very specific way; it is not about the most just way in which an individual can act, nor does it concern issues such as global justice. Instead, it is concerned with remedying past injustices that were caused before or during the conflict and ensuring that they will not be repeated again in the future. Although this type of post-conflict justice is connected to the way justice in developed and liberal societies is understood, the two differ in significant ways. The first is that while issues such as access to courts and social justice are relevant to both types of societies, post-conflict justice is primarily concerned with them to the extent that they have to do with the remedying of past or preventing of future injustices. Second, justice-promoting institutions in post-conflict societies often have to deal with issues that are not so widespread in mostly liberal contexts, such as the remedying of large numbers of displaced people. As time passes the concerns of post-conflict justice become less important and are replaced by those of ordinary justice;<sup>143</sup> however, this thesis is only concerned with the former. Importantly, since justice is something that people feel, rather than simply observe around them, its definition focuses not only on the structure of the institutions, but also on the effects of these institutions in real-life terms.

Justice in post-conflict societies has been deemed important since the early inception of peacebuilding, with practically every human rights treaty stressing in its preamble the need for 'peace and justice in the world'.<sup>144</sup> These two concepts seem to have been connected in the literature in two ways: first, ethnic conflicts are usually fuelled by feelings of injustice. Leaving such injustices unremedied and allowing them to continue after the end of the conflict sends people the message that nothing has changed. This, in turn, is likely to result in frustration and eventually violence until

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<sup>143</sup> Eric Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice', *Harvard Law Review*, 117 (2004), 761.

<sup>144</sup> This phrase is repeated in the preamble of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights and the European Convention on Human Rights.

the victims of the injustice obtain what they believe they are entitled to.<sup>145</sup> It is for this reason that justice requires not only the existence of institutions dealing with past grievances, but also that the applicants, in fact, feel that these have been addressed.<sup>146</sup> Second, the promotion of justice legitimises the peace agreement and the new state of affairs by distinguishing the actions of the new regime from the illegitimate acts caused during the conflict. The impact of justice on legitimacy was highlighted by Boulding who argued that a 'system of peace which is perceived by increasing numbers of its participants to have elements of injustice will be subject to increasing strain. [...] The sense of injustice ultimately erodes the whole legitimacy of the system and it collapses.'<sup>147</sup>

Perhaps the clearest indication of the importance of justice for peace is the rich and growing literature that exists on 'transitional justice'. Despite the important lessons that can be learned from this literature however, the term 'transitional justice' will not be used here as it carries with it baggage that is best avoided. For instance, its supporters take for granted that the transformation of the post-conflict society to its liberal, improved version will take place shortly after the conflict has ended and that this 'transitional period' can somehow be distinguished from the end result. Rather, the conception of post-conflict justice advocated here accepts that the peacebuilding process will be a long and slow one, especially since justice might be set back because of the conflicting demands of the other two elements of peace. Moreover, transitional justice scholars have generally placed emphasis on violent crimes rather than other types of injustices: the Truth and Reconciliation Commission in South Africa focused on 'gross human rights violations',<sup>148</sup> while the ICTY is concerned

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<sup>145</sup> Connie Peck, *Sustainable Peace: The Role of the UN and Regional Organizations in Preventing Conflict* (Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers, 1998); Parlevliet, 'Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management'.

<sup>146</sup> The UN acknowledges this when it states that "[...] the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.' (UN Secretary-General, 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', (New York: United Nations, 2004) at [2].)

<sup>147</sup> Boulding, *Stable Peace* at 70-71.

<sup>148</sup> The Promotion of National Unity and Reconciliation Act [No. 34 of 1995] limits the investigations of the Truth and Reconciliation Commission to 'gross violations of human rights', which it defines in Section 1 as 'the killing, abduction, torture or severe ill-treatment of any person' or 'any attempt, conspiracy, incitement, instigation, command or procurement to commit' such acts.

with grave violations of international criminal law.<sup>149</sup> This bias has resulted in a consistent lack of emphasis on violations of property and other socio-economic rights, thus providing a skewed understanding of justice in post-conflict societies. Finally and perhaps most problematically, transitional justice is deemed to have been delivered when the relevant institutions have been set up; conversely, the definition advocated here considers institution-building as an important first step, but as ultimately incapable of exhausting justice's demands.

Moreover, the term 'transitional justice' has been defined in such a way that it can mean almost nothing. For example, in her much-cited book, Ruti Teitel argues that the main purpose of transitional justice is to assist in the change from a less to a more liberal society through a 'collective public ritual', irrespective of that ritual's content.<sup>150</sup> Transitional justice can consist of both 'amnesties and punishment [which] are two sides of the same coin: [they are] legal rites that visibly and forcefully demonstrate the change in sovereignty that makes for political transition.'<sup>151</sup> However, this definition lacks even minimum justice criteria; ultimately anything can be part of transitional justice as long as it signifies change in some way. This broad but shallow definition is problematic because it compromises justice for the sake of transition; such a compromise should be viewed with suspicion, not least because of the lack of a general agreement as to what it is we are (and we should be) transitioning to. In fact, the perception of transition as something that should swiftly lead to a peaceful society, especially when that is achieved at the detriment of, rather than through, justice, could explain the low success rates of peacebuilding operations.

A further limitation of Teitel's account is that if everything that helps in the transition is part of transitional justice, this leaves little or no content for the other two elements of peace. This is not only problematic because it is descriptively inaccurate, but also because by classifying all peacebuilding measures as transitional justice, one is left unable to decide between potentially conflicting approaches. For example, some argue that transitional justice may require the forgiveness rather than punishment of

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<sup>149</sup> Statute for the International Tribunal for the Former Yugoslavia, adopted 23 May 1993 by Resolution 827.

<sup>150</sup> Teitel, *Transitional Justice* at 49.

<sup>151</sup> *Ibid.*, at 59.



war criminals,<sup>152</sup> while others contend that only by punishing the perpetrators can society move forward.<sup>153</sup> However, by conceptualising both alternatives as 'transitional justice', a choice between them becomes arbitrary. Conversely, a narrower definition of justice as the remedying of past injustices provides a clear answer to this dilemma by offering reasons for the punishment of criminals. This is not to argue that amnesties are never appropriate in post-conflict contexts; they might be necessary to appease a still powerful and armed opposition (thus promoting security) or because forgiving the perpetrators might be the best way to achieve reconciliation. Yet, in such cases, amnesties are used not because of justice's requirements, but despite them; contrary to justice's demands, protecting security or reconciliation is considered more pressing in the circumstances.

Having explained the reasons for abandoning the term transitional justice in favour of the post-conflict justice envisioned here, it becomes easier to explain what the latter actually means. Post-conflict justice is concerned with undoing or remedying the injustices of the past and ensuring that they will not be repeated in the future. Such injustices can vary from society to society, thus signifying the need to adopt different and content-specific justice-promoting measures. Despite such differences however, undoing and remedying injustices always requires that attention is paid to both the perpetrators and the victims. Perpetrators must be identified – and ideally punished – because it would perpetuate a sense of injustice if, following their crimes, they did not pay for them. While amnesties acknowledge the existence of perpetrators (since in order for an amnesty to be given, a crime must have been committed), this acknowledgment might be perceived as empty, thus unable to appeal to the sense of justice of the people. For example, while the South African Truth and Reconciliation Commission is generally considered to be among the most successful of its kind, one of the most powerful critiques against it, is the fact that it granted absolute amnesty to perpetrators, thus encouraged justice in only a superficial and empty sense.<sup>154</sup>

At the same time, undoing past injustices requires that the victims feel remedied to the greatest possible extent for the harm they have suffered. If the injustice is in the form

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<sup>152</sup> Ibid.

<sup>153</sup> Orentlicher, 'Setting Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime'.

<sup>154</sup> Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)', *Diacritics*, 32/3/4 (2002), 32.

of physical harm to a person, it might be necessary to compensate him or his family. Alternatively, if the injustice concerns forced displacement, remedying it might require that the victim either receives restitution of his property or is fairly compensated for it. Moreover, victims often claim that an equally or even more important way of promoting post-conflict justice, is an apology from the state or the perpetrators for their unjust conduct.<sup>155</sup> However, in addition to providing personalised remedies to individual victims, justice can also require the adoption of more holistic measures. Take, for instance, post-apartheid South Africa: decade-long discriminatory practices affected all areas of life for millions of people. The most effective way to remedy this injustice and reduce the huge socio-economic gap that was created as a result is, in addition to individual remedies, to adopt countrywide policies that provide better educational, housing and economic opportunities to the non-white communities.

In addition to remedying past injustices, it is also necessary to ensure that they will not be repeated in the future. Various steps can be taken in this direction, such as the reform of the judiciary and the police service. Moreover, a step that is almost always taken in order to prevent the repetition of past injustices is the reform of the constitution and the addition of safeguards to ensure that people are fairly represented and their wishes are acted upon. However, such constitutional reforms are often controversial because 'fair representation' tends to be subject to conflicting interpretations depending on the context and the interests of different ethnic groups. For instance, fair representation in South Africa is ensured by respecting the principle of one person-one vote, while the Bosnian Constitution largely rests on group representation. This issue is still controversial in Cyprus with Greek Cypriots insisting on as few group protections as possible and Turkish Cypriots having the opposite view. Both types of representation, and others that try to bridge the gap between them, have arguments for and against them, making it impossible to conclude with certainty on the single best choice.<sup>156</sup> Ultimately, what post-conflict justice requires in order to

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<sup>155</sup> Anna Bohlin, 'A Price on the Past: Cash Compensation in South African Land Restitution', *Canadian Journal of African Studies*, 38/3 (2004), 672.

<sup>156</sup> For arguments in favour of group protections and consociationalism, see Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977). For arguments against group rights, see Juha Raikka (ed.), *Do We Need Minority Rights? Conceptual Issues* (The Hague: Martinus Nijhoff, 1996). For arguments in favour of centripetalism, a

prevent future injustices might vary from society to society or according to each ethnic group's perception. Despite the difficulties of devising institutions respectful of the principle of fair representation however, this does not exhaust the steps that must be taken to prevent future injustices; the most effective way to achieve this objective is to make unjust conduct culturally, and not only legally, unacceptable.

Like with security and reconciliation, the requirements of justice will often not be fully respected in ethnically divided, post-conflict societies. Practical difficulties, such as the passage of time, the unreliability of evidence, the large numbers of victims and perpetrators and the difficulties in distinguishing between the two categories during times of intense violence, suggest that the injustices of the past will often not be fully remedied. Moreover, the sometimes-unavoidable need to compromise with nationalist hardliners suggests that constitutions of post-conflict states are not always as just as ideal justice would have required. However, what is important for the building of peace is that justice is present to a satisfactory rather than full extent and that it is sufficiently balanced with the other two elements. This takes us to the last element of peace in need of a definition – reconciliation.

### **(c) Reconciliation as the third element of peace**

The third element of peace is reconciliation and like the other two, its definition has been contested; there are, for example, disagreements as to whether it involves personal or political reconciliation and whether it should be understood as a process or an outcome. This section defines reconciliation both in terms of the final outcome it is intended to promote and in terms of the methods used to achieve this. It argues that the final outcome of this process is meaningful cooperation between members of different ethnic groups on both a personal and a political level. Willingness to cooperate on a personal level is likely to encourage political cooperation because whether political parties from different ethnic groups are prepared to work together, at least partly depends on the attitudes of the people they represent. On the other hand, political cooperation promotes good personal relations since these are more likely to be undermined by politicians who create animosity in order to win easy ethnic votes.

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model somewhere in the middle of the two alternative positions, see Donald Horowitz, *Ethnic Groups in Conflict* (2<sup>nd</sup> edn.; Berkeley: University of California Press, 1985).

The outcome of meaningful personal and political cooperation is achieved when a certain process is followed. In particular, people must start trusting each other again, which in turn requires that they no longer dehumanise each other.

The trust and rehumanisation of the enemy that are necessary for reconciliation can be promoted by removing the hurdles that prevent former enemies being perceived as people.<sup>157</sup> During the conflict, negative stereotyping, propaganda against and fear of the other side usually make people view members of the opposing group as less than human. The fact that members of the other group could be feeling scared, victimised or ashamed for the actions of their fellow group members or that all sides caused atrocities during a war is completely lost on most people. For instance, when interviewed, members of different ethnic groups in Bosnia expressed feelings that they were the biggest victims of the conflict and that while atrocities had been carried out by all sides, the ones committed by the opposing sides were premeditated, while those committed by their own people were just individual excesses.<sup>158</sup> As negative stereotyping of the other becomes more common, the individuality of the stereotyped group's members is lost and their dehumanisation becomes easier.<sup>159</sup> This stereotyping, portraying whole groups of people as less than human, predatory and unreasonable in their personal and political relationships, is the biggest hurdle to meaningful cooperation and it is this that reconciliation methods should attempt to address.

Two important distinctions should be made in order to clarify the meaning of reconciliation; the first is between meaningful cooperation and inter-group harmony. This is because despite the numerous hurdles in achieving the former, this is a much more modest aim than the arguably utopian goal of achieving the latter.<sup>160</sup> As Govier

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<sup>157</sup> Arie Nadler, 'Reconciliation: Instrumental and Socioemotional Aspects', in Daniel J. Christie (ed.), *The Encyclopedia of Peace Psychology* (New York: Wiley-Blackwell, 2012), 536.

<sup>158</sup> Dinka Corkalo et al., 'Neighbors Again? Intercommunity Relations after Ethnic Cleansing', in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: CUP, 2004), 143.

<sup>159</sup> Halpern Jodi and Harvey M. Weinstein, 'Empathy and Rehumanization after Mass Violence'. Also, for a discussion of how simplifying stereotypes and zero-sum conceptualisations of identities characterise (ethnic) conflicts, see Marlene C. Fiol and Edward J. O'Connor, 'Managing Intractable Identity Conflicts', in Daniel J. Christie (ed.), *The Encyclopedia of Peace Psychology* (New York: Wiley-Blackwell, 2012), 937.

<sup>160</sup> For a definition of reconciliation as inter-group harmony, see Yaacov Bar-Siman-Tov, 'Dialectics between Stable Peace and Reconciliation', in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution*

and Verwoerd put it, a 'realistic goal in contexts of reconciliation is not total harmony; nor is it a state of blissfully enduring unity.'<sup>161</sup> In order for harmony to exist, there must be a compatibility of the groups' needs and interests, but competitive politics in divided societies operate by highlighting precisely this lack of compatibility. Moreover, had such compatibility existed, it is unlikely that the society would have become ethnically divided and resorted to war in the first place. Separate groups, characterised by such distinct identities, needs and interests, do not have to be assimilated in order for reconciliation to be achieved. Reconciliation does not require the elimination of differences, but the ability to live with these differences through cooperation. This cooperation can be achieved when there is an adequate amount of trust, a confident expectation that one will act in a manner which will not take advantage of the other's vulnerability.<sup>162</sup>

The second distinction that must be made is between meaningful cooperation and mere co-existence among members of different ethnic groups. If people are living next to each other without communicating, cooperating or having common goals, wishing that they did not have to mingle with the other group at all, there is no real reconciliation. It is just a brief pause before the racist perceptions of each group resurface and potentially even result in more violence. If the UN is right that divided societies need a 'society wide system of values [...] to put a premium on peace, to desire peace, to seek peace and to stand for peace', then reconciliation has to mean more than simple co-existence.<sup>163</sup> Rejecting this minimalist definition however does not mean that meaningful cooperation has to stem from altruistic goals of loving one's enemy. It could result from the simple understanding that unless the members of different ethnic groups reconcile, the alternative will be catastrophic for all of them.<sup>164</sup>

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to *Reconciliation* (Oxford: OUP, 2004), 61 at 72 where he argues that reconciliation involves 'transforming the relations between rival sides from hostility and resentment to friendly and harmonious relations.'

<sup>161</sup> Govier and Verwoerd, 'Trust and the Problem of National Reconciliation' at 185.

<sup>162</sup> Ibid.

<sup>163</sup> United Nations, 'Proceedings of the United Nations Department of Public Information's International Encounter for European Journalists on the Question of Palestine', (London: United Nations, 1993).

<sup>164</sup> Charles Villa-Vicencio, 'Reconciliation', in Charles Villa-Vicencio and Erik Doxtader (eds.), *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* (Cape Town: Institute of Justice and Reconciliation, 2004), 3.

An argument could be made that the definition of reconciliation as the meaningful cooperation between ethnic groups is too ambitious; a better (and more achievable) alternative is to focus instead on the need to respect the rights of others.<sup>165</sup> In every society, whether ethnically divided or not, there are political conflicts about what should be the preferred course of action in a given situation. Unless political discussions can take place and ultimately lead to a negotiated outcome, these political conflicts can paralyse the country. Conceptualising reconciliation as the need to respect the rights of others avoids this danger because it provides a discourse and vocabulary in which political conflicts can be framed. Arguably however, this understanding of reconciliation is too restrictive because it ignores the fact that not every single political conflict can be expressed in rights terms. Moreover, in the likely scenario where the parties are not in agreement as to what each competing right actually entails, expressing the political conflict in rights terms, only rephrases, rather than manages, the problem. Finally, this definition of the term should be avoided because of its unsuitability in answering the question at hand: since our objective is to clarify the relationship between rights and peace (and consequently, between rights and reconciliation), any analysis becomes circular if reconciliation itself is defined as the respect of other people's rights.

Thus, reconciliation is best understood as having been achieved when hostile feelings are slowly transformed into a tendency not to dehumanise the members of the other groups and then into the development of trust and a willingness to cooperate. This is a process that, even in the most favourable conditions, takes years to complete; reconciliation does not occur naturally, it needs effort and time and it is rarely the result of a linear process.<sup>166</sup> While positive attitudes between individuals from different groups might develop in the workplace, social pressures might prevent them from materialising in their personal lives. Further, such positive attitudes might increase or decrease depending on a number of external factors, such as economic crises or spoilers. Consequently, a number of reconciliation methods, bottom-up and top-down, and spanning different periods of time have to be used. Each method has

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<sup>165</sup> Lesley McEvoy, Kieran McEvoy and Kirsten McConnachie, 'Reconciliation as a Dirty Word: Conflict, Community Relations and Education in Northern Ireland', *Journal of International Affairs*, 60(1) (2006), 81.

<sup>166</sup> Daniel Bar-Tal and Gemma Bennink, 'The Nature of Reconciliation as an Outcome and as a Process', in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation* (Oxford: OUP, 2004), 11.

its strengths and weaknesses and might work with some people, but not with others, so a combined effort is preferable. The combination of the methods that should be used depends, among others, on the kind of conflict, the resources available and the cultures of the groups involved.<sup>167</sup>

Common examples of reconciliation mechanisms include Truth Commissions and communication workshops. Truth Commissions, like the one that took place in South Africa, contribute towards reconciliation by providing evidence about the atrocities that took place during the conflict and helping to eliminate some of the myths that were circulated before and during its occurrence.<sup>168</sup> Such myths, an outcome of negative stereotyping, include suggestions that only one side was the perpetrator of crimes and that every member of that ethnic group enthusiastically endorsed the violations. On the other hand, communication workshops can promote reconciliation by encouraging participants to listen to the other's story in order to appreciate that he is not the monster that he was portrayed to be. Understanding a person's motives in acting in a specific way or making a particular demand makes it more likely that this will be accepted as reasonable, and as a result, encourages cooperation. Thus, these reconciliation mechanisms suggest that while social engineering is impossible, there are ways in which the negative perceptions of people can be challenged, so that in the long term, trust between members of different groups is achieved and the divisions that characterise the conflict become less salient.

## **5. Conclusion**

The purpose of this chapter was to clarify the ultimate aim of peacebuilding by defining the concept of peace in post-conflict, ethnically divided societies. It rejected Galtung's idealist and all encompassing definition of peace in favour a more realistic one, which consists of the elements of security, justice and reconciliation. An advantage of this definition is that it draws a clear line connecting the different elements of peace and the methods that should be used to achieve them. This is not to imply that decisions about what peacebuilding tools should be used, when and in what

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<sup>167</sup> Ibid.

<sup>168</sup> Michael Ignatieff, 'Articles of Faith', *Index of Censorship*, 5 (1996), 110.

way are easy to reach; it does however make them more transparent. Elements of peace can promote each other, but they can also contradict, thus making it necessary to strike a balance between them. Often therefore, the decisions that concern the use of peacebuilding tools are about determining whether in specific circumstances their potential advantages outweigh the dangers they might create. It is this analysis that unfolds in the following chapters in relation to human rights, one of the most popular peacebuilding tools: will their protection, on balance, be beneficial or detrimental to security, justice and reconciliation?

The proposed definition of peace already starts elucidating the relationship between it and human rights: the, sometimes conflicting, demands of the elements suggest that their connection to peace is not always positive. While the use of human rights will in some cases be a straightforward matter, readily promoting all three elements of peace, in others, it can be beneficial to one, but detrimental to another. Moreover, it is also possible that in addition to some elements being positively or negatively connected to human rights, others might have no relationship to them at all. It follows, that the overall relationship between the two concepts varies depending on the context of each ethnically divided, post-conflict society and the balance that is struck between the three elements as a result. Ultimately, the tripartite definition of peace reflects a relationship with human rights that, unsurprisingly, is rarely the simple and positive one assumed by the international community. Before elaborating on this relationship in more detail however, it becomes necessary to also clarify how peacebuilders usually understand the term ‘human rights’, a task that is undertaken in the next chapter.



## **Chapter 3: Defining human rights**

### **1. Introduction**

Much like the concept of peace, the term ‘human rights’ is in need of a definition, but for precisely the opposite reasons. While few attempts have been made in the literature to explain the meaning of peace, human rights have been the subject of an impressive number of academic debates that seek to define, justify and explain their content.<sup>169</sup> Yet, when the Brahimi Report states that ‘the human rights component of a peace operation is indeed critical to effective peace-building’ but offers no definition of ‘human rights’, it creates the misleading impression that there is a clear understanding and consensus as to what the term means.<sup>170</sup> This contributes to the international community’s rather simplistic assumptions about the existence of a necessarily and always positive relationship between human rights and peace, which this thesis aims to nuance. Consequently, it becomes necessary to derive a clear and workable definition of human rights that prevents conclusions of the sort of ‘all good things go together’.

The definition that this chapter elaborates on is not intended to be ‘the best philosophical account of human rights’ or convince the reader that any alternative understanding of rights is somehow ‘wrong’ or less worthy of attention.<sup>171</sup> It moreover, does not seek to make an exhaustive list of all the characteristics that human rights generally possess. Rather, I have settled on this definition because it most accurately describes what peacebuilders – whether they are writing reports for the UN or implementing strategies in the divided societies themselves – have in mind when they refer to the term ‘human rights’. Thus, it is likely to provide the most relevant answer to the question of what is the relationship between human rights and peace. While it might be criticised as being too narrow or artificially restricted (mainly because it exclusively focuses on *legal* human rights), an alternative account

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<sup>169</sup> Guglielmo Verdirame, ‘Human Rights in Legal and Political Theory’, in Nigel Rodley and Scott Sheeran (eds.), *Routledge Handbook of International Human Rights Law* (Milton Park, Abingdon, Oxon; New York: Routledge, 2013). Moreover, while Verdirame’s

<sup>170</sup> Panel on United Nations Peace Operations, ‘Report of the Panel on United Nations Peace Operations’, (New York: United Nations, 2000) at [41]. (Henceforth, ‘Brahimi Report’.)

<sup>171</sup> James Griffin, ‘Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’, *Proceedings of the Aristotelian Society, New Series*, 101 (2001), 1.

would have achieved definitional inclusion to the detriment of accuracy as to what the term is understood to mean in practice.

In order to arrive at the proposed definition of human rights, I make four choices between competing conceptions of the term: first, I argue that when deciding between human rights as empowering choices or protecting interests, the latter should be preferred. Second, these interests that human rights protect are fundamental, as opposed to merely ordinary ones. Fundamental interests are not singled out by identifying those of them that connect to a foundational principle such as personhood, but through a political process in which states determine their international obligations. Third, the fundamental interests that human rights protect are safeguarded in the legal rather than the moral domain. Fourth, despite there being an overlap between the domestic and international legal protections of these fundamental interests, a distinction should be made to highlight their differences. Thus, *human rights are fundamental interests that can be legally protected on the domestic or international level*. In deciding between these four sets of choices, I consider the theoretical persuasiveness of each alternative and the extent to which choosing it is appropriate for the specific question I am asking. Thus, my decision to focus both on the domestic and international protection of human rights is not an arbitrary one, but is based on the fact that the conflicts that are undermining peace in ethnically divided, post-conflict societies are, in practice, managed in both national and international forums.

## **2. Human rights as protecting interests**

One of the most basic disagreements between human rights scholars concerns the question: ‘what are human rights for?’ This leads to a debate about the purpose of rights more generally and whether they are there to protect the right-holder’s choices or interests.<sup>172</sup> On the one side of the debate, choice theorists argue that rights are tools whose purpose is to allow right-holders to have a choice and control over their relationships with other people and in particular, duty-bearers. On the other, interest

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<sup>172</sup> For the argument that human rights should be grounded in a more general theory of rights, see John Skorupski, ‘Human Rights’, in Samantha Beeson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: OUP, 2010).

theorists believe that a right is afforded to right-holders when they have an interest in, or they are likely to benefit from, what is being protected. Of course, to the peacebuilder who is concerned with managing conflicts and crises day in and day out, it makes little difference if rights are perceived on the philosophical level as protecting choices or interests. Nevertheless, conceptual clarity can lead to better-informed and justified explanations for what is happening in practice. Neither of the two theories of rights is completely persuasive, but the interest theory offers a more compelling account of how human rights operate on the ground and can, as a result, provide more meaningful insights about their relationship to peace in ethnically divided, post-conflict societies themselves.

Choice theorists start from the premise that rights and duties go together and that where there is a right-holder, there is automatically and simultaneously a duty-bearer as well.<sup>173</sup> The choice theory is based on the idea that having a right in something recognises that the right-holder controls his relationship with the duty-bearer in relation to the content of that particular right. Thus, by virtue of having a right, it is to the discretion of the right-holder whether to use it in the first place (and therefore demand from the duty-bearer to act or abstain from acting in a certain way) or choose to waive it. Moreover, if that right has been violated by the duty-bearer, the right-holder, who in the words of Hart is a 'small scale sovereign', can choose whether and when to ask for a remedy for that violation.<sup>174</sup> Thus, according to the choice theory 'rights exist only when people have such normative power over duties of others.'<sup>175</sup> The main advantage of the theory is that it captures the powerful link between individuals, the normative control they should exercise over their affairs and autonomy.<sup>176</sup> One of the key tenets of liberalism is autonomy and the idea that people should judge for themselves what is in their best interest; the choice theory supports this idea in practice by empowering individuals to choose whether, how and when to use their rights as they see fit.

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<sup>173</sup> Herbert Hart, 'Legal Rights', in Herbert Hart (ed.), *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: OUP, 1982).

<sup>174</sup> *Ibid.*, at 183.

<sup>175</sup> Neil MacCormick, 'Children's Rights: A Test-Case for Theories of Right', in Neil MacCormick (ed.), *Legal Right and Social Democracy* (Oxford: OUP, 1984) at 156.

<sup>176</sup> Leonard Wayne Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987) at 98-99.

However, despite its intuitive appeal, the choice theory is suffering from two major drawbacks: first, that it has difficulties in treating some groups of people as right-holders and second, that it cannot justify the existence of all the human rights we value. The first drawback was clearly and persuasively illustrated when Neil MacCormick showed how the choice theory fails to explain the existence of children's rights.<sup>177</sup> He argued that morally (and in most jurisdictions legally) speaking, every infant and child has the right to be nurtured and cared for until she is ready to take care of herself on her own. This is despite the fact that the child cannot relieve her parents of their duty to take care of her, which according to the choice theory would negate the existence of the right. Supporters of the choice theory could argue that the child's inability to control the right does not necessarily imply the absence of such a right because it is sufficient for a third person acting on behalf of the child to do so. However, the people who are usually acting on behalf of the child are her parents, yet the law prevents them from waving their parental duties to take care of the child. Moreover, morally speaking there seems to be no reason to suppose that the child or anyone acting on her behalf should be permitted to waive such parental duties. In cases where parents are unable or unwilling to fulfill their duties to take care of the child the State takes over, but this is not due to the parent waiving the child's right to be taken care of. Rather, this happens because such a step is in the interests of the child and it is for this reason that parents might also be punished for failing to fulfill their obligations to act accordingly. It might be true that in the majority of cases the right-holder is permitted to choose how to exercise his right. However, such powers are 'essentially ancillary to, not constitutive of, rights'.<sup>178</sup> Rights tend to confer this control to right holders because of the liberal assumption that we are the best judges of what is in our best interest, rather than because they are necessarily about protecting personal choices.

In fact, if we insist that a right exists only if the right-holder can choose how and whether to use it, it becomes impossible to justify the existence of all the rights that are considered fundamental in democratic societies. For instance, while the right to vote is among the most universally accepted rights, it is not completely compatible with the choice theory. In some jurisdictions it is legally mandatory to attend elections

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<sup>177</sup> MacCormick, 'Children's Rights: A Test-Case for Theories of Right'.

<sup>178</sup> Ibid., at 164.

and cast a vote, even though the right-holder can decide to invalidate her ballot. There are also moral arguments why citizens should always be required to vote, rather than have a choice in the matter, such as that everyone's participation legitimises the outcome of elections to a greater extent or that it can encourage civic patriotism among the people. Thus, contrary to the choice theory's assumptions, it is, at least in certain cases, impossible and undesirable to waive the right. Moreover, even though citizens undoubtedly have a right to vote, they do not have unlimited discretion as to how to use it. For instance, it is, and rightly so, always illegal to sell one's vote, thus illustrating that the existence of the right does not and should not confer unlimited choices to the right-holder as to its use. Whatever the theoretical arguments in favour of the choice theory, it does not seem to reflect the reality of human rights on the ground. Since the objective of this definitional exercise is to identify the characteristics of human rights as understood and applied by the peacebuilders themselves, an alternative to the choice theory should be sought.

The most popular alternative to the choice theory, and the one adopted here, is the interest theory of rights. This theory is based on the idea that a right is afforded to right-holders when they have an interest in, or they are likely to benefit from, what is being protected. Thus, according to the interest theory, 'to ascribe to all members of a class *C* a right to treatment *T* is to presuppose that *T* is, in all normal circumstances, a good for every member of *C*, and that *T* is a good of such importance that it would be wrong to deny it to or withhold it from any member of *C*.'<sup>179</sup> What matters for the interest theory is that we protect rights because of the interests they safeguard, rather than because they protect individuals' choices. One of the most prominent interest theorists, Joseph Raz, has adopted a broad definition of the term 'interest' to include both individual and general interests (what he refers to as common goods).<sup>180</sup> He argues that rights are protected because they safeguard individual interests, but they gain additional importance if they contribute to the common good.<sup>181</sup> Raz gives the example of freedom of expression: the right primarily protects the individual interests of those who want to express their views or listen to the views of others. Nevertheless,

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<sup>179</sup> MacCormick, 'Children's Rights: A Test-Case for Theories of Right' at 160.

<sup>180</sup> Raz defines individual interests as those that directly benefit the individual and the 'general, or common good or interest' as 'those goods which, in a certain community, serve the interest of people generally in a conflict-free, non-exclusive and non-excludable way'. (Joseph Raz, 'Rights and Individual Well-Being', *Ratio Juris*, 5/2 (1992), 127 at 135.)

<sup>181</sup> *Ibid.*, at 135-36.

although these interests are important enough to justify the right's existence on their own, it acquires added significance and deserves greater protection because it also serves the common goods of democracy and free exchange of information.<sup>182</sup>

It has been argued that the importance Raz attaches to the interests of others or the common good results in his theory providing a less-than-satisfactory account of the stringency of rights.<sup>183</sup> This criticism stems from a reading of Raz's work which considers the common good as a fundamental element to the justification of human rights and which in turn implies that their existence is independent from the interests of the right holder. While some passages in *The Morality of Freedom* support this interpretation of the theory,<sup>184</sup> in others Raz explicitly warns that his discussion of general interests should not 'elevate them into a universal rule and claim that rights exist only when such considerations apply.'<sup>185</sup> Such factors are 'generally marginal' and highlighting their importance should not obscure the fact that rights primarily represent concern for the interests of the individual.<sup>186</sup> Irrespective of which reading of Raz's theory one adopts, the lack of clarity about the extent of the general interests' contribution in justifying rights, is a problem in itself. However, it is impossible to agree on a completely satisfactory account of rights. Despite this deficiency, Raz's account offers a good explanation of the purpose of rights: to protect interests that are important enough to merit protection.

Unlike the choice theory, the interest theory can satisfactorily explain both why children have rights and why the right to vote exists even though its right-holders do not have absolute discretion as to how to use it. It makes it clear that children enjoy rights and cannot waive their protection because it is in their interests to be protected. Such rights create duties on their parents to take care of them until they can do so themselves and if the parents fail to discharge their obligations, the right remains and the duty is transferred to the state. The interests that are protected by the right are both for the benefit of the children and for society at large since they will one day grow up

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<sup>182</sup> Ibid., at 137.

<sup>183</sup> Joseph Chan, 'Raz on Liberal Rights and Common Goods', *Oxford Journal of Legal Studies*, 15 (1995), 15; Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: OUP, 2007) at 40.

<sup>184</sup> See, for example, Joseph Raz, *The Morality of Freedom* (Oxford: OUP, 1986) at 136.

<sup>185</sup> Ibid., at 188.

<sup>186</sup> Ibid.

and become active citizens of that society. This theory is also preferable to the choice theory because it is premised on the fact that rights exist prior to duties, thus making it possible to argue that a change of circumstances can alter the duties created by a right or even the duty-bearer himself. Similarly, the theory can explain why the right to vote exists, despite limitations on how the right-holders can use it: it is because its protection is both in the interests of the right-holders themselves and society at large. The individual right-holder benefits because he has the power to influence the politicians and the policies of the country, while the equal exercise of the right by everyone also contributes to the common good of democracy. It is because of this second, more general interest that the selling of votes is prohibited.

An additional advantage of the interest theory is that it provides the tools to explain how a right might be affected by more than one interest and how these interests can strengthen the protection of the right or require its limitations. Thus, the right to vote discussed in the previous paragraph offers an example of how different individual and general interests can come together to strengthen the right's protection. On the other hand, different interests might conflict with each other, some offering reasons for the protection and others for the limitation of the right. Such balancing exercises in order to determine the content of a right are very common, and it is an advantage of the interest theory that it can accommodate and reflect them properly. (In contrast, the choice theory with its emphasis exclusively on the choices of the individual obscures this balancing exercise to a greater degree.) A typical example of conflicting interests affecting the content of the right to vote is offered by the European Court of Human Rights (ECtHR) case of *Ždanoka v. Latvia*.<sup>187</sup> In this case, the applicant, a senior member of the Communist Party before Latvia's independence, was prevented from running in the 1998 Parliamentary elections because of her political affiliation. The facts of the case illustrate how the Court had to strike a balance between the individual interest of the applicant to participate in a democratic government and the general interest, protected by the State, of preventing dangerous and anti-democratic parties from coming to power. This potential of the theory to illuminate how a balance is being struck between different interests is highlighted by Raz who points out that a

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<sup>187</sup> *Ždanoka v. Latvia* (2007) 45 E.H.R.R. 17.

right exists when there are interests providing justifications for the existence of the right on the one hand that outweigh any contrary considerations on the other.<sup>188</sup>

The ability of the theory to strike a balance between the different interests that are at stake in a given scenario is particularly important for the purposes of determining the relationship between peace and human rights in ethnically divided societies. As the previous chapter argued, peace is made up of sometimes-conflicting elements; some of these will be promoted and others will be undermined through the protection of human rights. With this in mind, the interest theory of rights is better suited for the project undertaken here because it can accommodate this balancing exercise. This is in contrast to the choice theory, which states that a right should be protected simply when the right-holder insists so. If two right-holders claim the respect of their rights which are in conflict, one has to determine where to draw the line between them, yet the choice theory provides no clear indication on how this will be done. Returning to the case of *Ždanoka v. Latvia*, the interest theory of rights allows us to show how different elements of peace connect to different interests being balanced by the Court: the element of security (relating to the general interest of preventing the re-election of a dangerous party to power) was deemed more important than the element of reconciliation (which could have been promoted if the applicant was allowed to run for elections and other candidates used the opportunity to question her about her party's past conduct).

Ultimately therefore, on the most general level, rights have been conceptualised as protecting interests (and, as a result, creating duties). The idea that each human right protects different interests suggests that there is not just a single relationship between all human rights and peace. Rather, each human right can, depending on the ethnically divided society it operates in and the interests it protects, relate to the three elements of peace in a different way. This conclusion is revisited in the practical section of the thesis, where it is argued that protecting the right to vote and the right to property can affect peace in diverse ways depending on the context in which they are implemented.

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<sup>188</sup> Raz, *The Morality of Freedom* at 181.



### **3. Ordinary and fundamental rights**

Having established that the interest theory provides a satisfactory, albeit not perfect, account of the purpose of rights, this leads to the logically subsequent issue concerning the nature of the rights in question. If sufficient individual interests that outweigh contrary considerations can ground all rights, what kinds of interests and rights are we specifically referring to when we are talking about *human rights*? It is possible, for instance, to argue that there are sufficient individual interests to support the right that a contract should be enforced; it is not however the case that that right is also a human right. I argue in this section that human rights are a special category of rights, also referred to as fundamental, which have priority over all other rights. They are fundamental, not because they acquire their status from a foundational principle, but because they have been singled out through political processes as deserving a special type of protection by the Courts.<sup>189</sup> Conversely, rights that do not fall within this special category are simple, ordinary legal rights that are not mentioned in the Constitution but are nevertheless protected by the Courts. (It can be assumed for now that human rights refer to ‘fundamental legal rights’, an assumption that will be justified in the next section.)

There are two types of explanations as to why fundamental, or human, rights are singled out from ordinary ones. The traditional approach, supported by James Griffin argues that the distinction between ordinary and fundamental rights lies in the fact that the latter are rights ‘that a person has [...] simply in virtue of being human.’<sup>190</sup> Although he does not use these terms, the aim of his theory is to define fundamental rights and distinguish them from ordinary ones in order to avoid an uncontrollable inflation in the numbers of the former. He argues that rights should be considered human rights when they satisfy two criteria: first, they must allow people to act as normative agents, which is an essential feature of personhood, and second, their content should meet certain practical considerations.<sup>191</sup> He defines normative agency as consisting of autonomy and liberty, which respectively require that our decisions

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<sup>189</sup> Raz, *The Morality of Freedom* at 256-63.

<sup>190</sup> James Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights'.

<sup>191</sup> James Griffin, 'Human Rights and the Autonomy of International Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: OUP, 2010) at 346.

must be informed and that we must have enough material provisions to support ourselves. By practical considerations Griffin has in mind things that could affect the content of the right, such as the characteristics of human nature or whether a right is too complicated to achieve the intended outcome successfully. These two criteria allow Griffin to devise a list of human or fundamental rights, which, for example, includes a right to education, but not the right to vote.<sup>192</sup>

While the traditional approach sounds noble and intuitively correct – in that we think that there should be a connection between human rights and our humanity – it is ultimately unpersuasive because it does not include any real criteria to determine the content of human rights. As a result, any scholar could argue that rights she considers worthy enough are necessary for the protection of our personhood without the theory providing any tools to counter such claims. For example, Griffin extends his theory to argue that rights should not only protect autonomy and liberty, but also the conditions that will make these possible and in this way he justifies socio-economic rights, such as the right to education. However, the conditions that make liberty and autonomy possible (such as knowledge, resources and opportunities) are present at least to some degree in every human being by virtue of just being alive and non-comatose. When Griffin refers to the conditions that make our personhood possible, he arguably has a higher standard of protection in mind. Yet, he neither offers nor can offer any criteria to determine what this higher standard should be, thus making it possible for anyone reading his theory to arbitrarily draw the line of what is a fundamental right where she considers appropriate.

Griffin's theory of personhood is not the only attempt to explain what it means to have rights by virtue of being human. Some have relied on religious doctrines and the idea that we are all equal under God,<sup>193</sup> while others have offered alternative secular accounts. An example of the latter is Alan Gewirth who has famously argued that '[h]uman rights are based upon or derivative from human dignity. It is because

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<sup>192</sup> For an application of Griffin's theory to the right of democratic participation, see James Griffin, *On Human Rights* (Oxford: OUP, 2008) at Ch. 14. For a discussion of the right to education, see Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights'.

<sup>193</sup> Nicholas Wolterstorff, *Understanding Liberal Democracy* (Oxford: OUP, 2012) at Ch. 7 and 8.

humans have dignity that they have human rights.’<sup>194</sup> The criticism that Griffin’s theory cannot provide any real criteria for the list and content of human rights applies to all foundational theories. Moreover, the existence of various theories, each emphasising a different foundational principle, begs the question of which is the ‘correct’ one and how that can be determined. Why is, for example, personhood more important than dignity (or vice versa) and why is it the case that the only two necessary conditions for personhood are liberty and autonomy? The major problem with foundational theories is not that they do not provide answers to these questions, but that they cannot do so without relying on the subjectively held beliefs of their authors.

These shortcomings of the traditional approach suggest that a different way of distinguishing between fundamental and ordinary rights is needed. The distinction should not exist because of any connection that fundamental rights necessarily have to our humanity or other foundational principles, whether religious or secular. Rather, and especially bearing in mind that the objective of this exercise is to understand what peacebuilders mean when they use the term, the distinction between fundamental and ordinary rights should be explained by focusing on the practice of human rights themselves. International institutions that create legal rights do not necessarily have a good grip on moral philosophy and in any case, they are not trying to mirror it exactly by creating legal rights that reflect a particular understanding of humanity. As one of the delegates to proceedings prior to the Universal Declaration of Human Rights put it, ‘Yes we agree about the rights but on condition that no one asks us why.’<sup>195</sup> Thus, it should be accepted that states and international actors, including peacebuilders, engage in a political process of negotiation and compromise regarding their international obligations and it is through that process rather than philosophical reflection that some rights are singled out as fundamental.<sup>196</sup> Of course this is not to argue that fundamental legal rights are not connected to fundamental moral rights in any way. After all, one of the advantages of the interest theory, which focuses on the

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<sup>194</sup> Alan Gewirth, 'Human Dignity as the Basis of Rights', in Michael Meyer and William Parent (eds.), *The Constitution of Rights: Human Dignity and American Values* (Ithaca: Cornell University Press, 1992) at 10.

<sup>195</sup> Jacques Maritain, 'Philosophical Examination of Human Rights' in UNESCO, 'Human Rights: Comments and Interpretations', UNESCO/PHS/3 (Paris, 25 July 1948).

<sup>196</sup> Raz, *The Morality of Freedom* at 256-63; Joseph Raz, 'Rights and Politics', *Indiana Law Journal*, 71/1 (1995), 27 at 43.

normative justifications of rights and not only their structure, is that it can make claims about both moral and legal rights and therefore show that the two are connected.<sup>197</sup> In practice, when international bodies debate about the creation of a new right, they appreciate that that right is important because of its connection to our moral intuitions. However, it is one thing to acknowledge an intuitive connection between our humanity and fundamental legal rights, and quite another to argue that the latter are always and necessarily protected because they derive from a single moral principle.

In acknowledging that a moral theory of rights cannot provide all the answers, Raz's more modest political approach explains in a more persuasive manner the distinction between ordinary and fundamental rights: what ultimately separates fundamental legal rights from the rest is not their inherent connection to our humanity, but the fact that they were singled out by (international) institutions as special. Raz's important contribution comes by arguing that legal fundamental rights 'express values which should form a part of morally worthy political cultures', but not feeling the need to pinpoint the content of such values or reduce them to a single foundational one.<sup>198</sup> However, the political approach is not completely reductionist. It also provides some criteria for the existence of fundamental rights by arguing that one of the reasons that they fall in this special category is the fact that they possess certain characteristics that generally make the judiciary, rather than politically accountable institutions, the more appropriate bodies to deal with them.

The first characteristic that makes human rights appropriate for this 'fundamental rights status' is that there is a societal consensus about the importance of their protection and the second is that this consensus is not easily challenged by sudden changes in society. Fundamental rights, in other words, form part of the country's 'basic political culture', which is expressed in its (written or unwritten) Constitution, and generally tends to remain unaltered.<sup>199</sup> It is thus appropriate to create a special protection for such rights by insulating them from everyday politics and demanding

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<sup>197</sup> A theory which would not be able to make claims about both moral and legal interests is one that is exclusively focused on the structure rather than the normative justification of rights. In particular, I have in mind Hohfeld's theory of rights. (Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Aldershot: Ashgate, 2001).)

<sup>198</sup> Raz, *The Morality of Freedom* at 262.

<sup>199</sup> *Ibid.*, at 259.

that principled and persuasive reasons are articulated for their limitation. Judges, who decide cases following reasoned debate and who are politically unaccountable because they are unelected, are particularly well-suited to protect this more permanent ‘basic political culture’; in contrast, politicians who might be affected by other, more passing considerations, are less so. Additional characteristics of fundamental rights include the fact that they are likely to result in disputes where the individual has special standing and that they tend to relate to a limited set of self-contained facts. These also make the Courts the most appropriate bodies to deal with them because the adjudicative process is designed to take into account the specific circumstances of the individual, rather than engage in a policy-making exercise that focuses on general considerations and the wishes of the majority.<sup>200</sup>

Raz’s political approach has three main advantages over the traditional one. First, its less ambitious explanation for the existence of fundamental rights means that it is not suffering from the same theoretical deficiencies as Griffin’s theory. Decisions about which rights should be considered fundamental and what their scope should be are informed by practical considerations, such as the role of the Courts versus the legislature, rather than abstract and ultimately permanently unanswerable questions of what people deserve in virtue of their humanity. One critique of Raz’s approach is that it is not ambitious enough, since, in an attempt to come up with a coherent way of describing human rights, it misses their operative characteristic: that which connects them to humanity. However, the political approach does not deny that there is a connection between human rights and humanity; it simply suggests that while that might be the case, this connection is neither necessary nor sufficient to explain why we label fundamental rights as such. In fact, it is arguably the case that rights we readily consider as fundamental, such as the right to private life or freedom from torture, are considered as part of our ‘basic political culture’ precisely because of their connection to values that are important to our humanity such as dignity, autonomy and liberty. Yet, we gain nothing if we insist on that connection as the centrepiece of the theory that describes fundamental rights.

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<sup>200</sup> The implications of these characteristics, namely the inability of human rights to successfully manage certain types of divisive political conflicts, become clear in Chapter 5.

The second advantage of this political approach is that it reflects the practice of human rights more accurately than the traditional one. For instance, Griffin's theory argues that there should not be a human right to democratic participation despite the fact that Article 25 of the International Covenant on Civil and Political Rights recognises the rights 'to take part in the conduct of public affairs', 'to vote and to be elected' and 'to have access, on general terms of equality, to public service in [one's] country'.<sup>201</sup> Because of its failure to accurately reflect reality, the traditional approach cannot make any real contribution to questions such as how the right should be interpreted by the Courts. In contrast, the political approach argues that fundamental rights are those which are concerned with 'matters admitting of greater stability, slower change, and of being settled by argument rather than through interest group coalitions', thus properly reflecting human rights practice.<sup>202</sup> These criteria can both meaningfully contribute to the debate of which rights should be considered fundamental and what is the role of the Courts in interpreting them. Importantly, this capacity of the political theory to reflect the practice of human rights makes it better suited when examining their effect in promoting peace on the ground.

The third advantage of basing the existence of fundamental rights on the political process of negotiation, and the most relevant to the objectives of this thesis, is that it can explain the sometimes simplistic way in which the international community's expectations of human rights are phrased. In practice, the inclusion of the phrase 'human rights' in a UN document can be subject to rigorous background negotiations, with the end result often being achieved to the detriment of sophistication about what human rights can actually achieve. For example, when the *Agenda for Peace* urges us to make the 'utmost effort to enhance respect for human rights and fundamental freedoms' because these can 'promote sustainable economic and social development for wider prosperity', 'alleviate distress and [...] curtail the existence and use of massively destructive weapons', there is clearly an expected hyperbolae there.<sup>203</sup> It would thus be unfair and probably incorrect to criticize the *Agenda's* drafters as being

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<sup>201</sup> Griffin acknowledges the existence of a right to democratic participation in the UN framework, but argues that this right is not a fundamental one; it is at best a derived right that becomes necessary in 'modern conditions'. (Griffin, *On Human Rights* at 254.)

<sup>202</sup> Raz, 'Rights and Politics' at 43.

<sup>203</sup> UN Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992', (New York: United Nations, 1992) at [5].

unaware or unappreciative of human rights' limitations; their expected positive effects were emphasized precisely because it was necessary to do so in the process of political negotiations. It is for this reason that the objective of this thesis is not to criticise UN documents *per se*. Rather, Part 2 argues that some of the – understandably – simplistic expectations of human rights listed in UN reports have found their way, *without any added nuance*, in the peacebuilding strategies adopted in ethnically divided, post-conflict societies; and therein lies the problem.

Thus, human rights protect fundamental interests; they are distinguished from ordinary rights because of certain characteristics they possess, which make the judiciary the most appropriate body to protect them. These characteristics already point to certain conclusions about the relationship between human rights and peace. For instance, if peace consists of something more than that which can be objectively discussed in a court of law – such as a subjective sense of security or feelings of trust among previously warring individuals – it follows that merely protecting human rights might be an insufficient way of promoting it. Similarly, if the concern of fundamental rights is the protection of certain interests within a given set of self-contained facts where the individual has special standing, what can they tell us about the broader relationships between ethnic groups and how can they guide debates, which unavoidably arise during peace negotiations, about the general structure of democratic institutions?

#### **4. Moral and legal human rights**

Even after agreeing that human rights are concerned with the protection of fundamental interests, a key distinction remains unexplored: that between moral and legal human rights. Undoubtedly the two types of rights are connected and moral rights can influence and affect legal ones. However, they should remain distinct because while they are both essential in a liberal society, they operate and are helpful in different ways, thus making it necessary to be clear about their differences. This section examines two opposing views about how moral and legal rights connect: on the one hand, it has been implied that there is no distinction between the two (or at least not one that is worth making) and on the other, that moral rights are neither necessary nor sufficient to justify the presence and protection of legal ones. I argue

that these views offer important insights about the relationship between the two types of rights, but both are ultimately unpersuasive, thus making it necessary to recognise equally their connections and distinctiveness. For the purposes of this thesis, the issue of distinctiveness becomes particularly important because it explains why moral and legal rights relate to peace in different ways and why ultimately, I will only be focusing on the peacebuilding effects of the latter.

The central objective of Griffin's personhood theory is to explain what we mean by human rights and how they can be justified. Despite his long answers to these questions however, he never distinguishes between moral and legal facets of rights. In fact, although his thesis (that the foundation of human rights is personhood) is a *moral* one, its explicit aim is to prevent the proliferation of *legal* human rights. Evidence of this is that Griffin tests the effects of his theory by applying it to legal instruments such as the Universal Declaration of Human Rights.<sup>204</sup> Although he does not explicitly discuss the relationship between moral and legal rights, his approach implies one of two conclusions. Either Griffin does not make any distinction between the two facets and considers that they have identical content and justifications, or he believes that moral and legal rights are so directly and automatically connected that their distinction is only a technicality. According to the second, more likely possibility, justifying and determining the content of moral rights requires the same steps, or at least steps that are similar enough so as not to make a difference, as carrying out the same exercise for legal rights. The implication of this theory is that if a moral right exists, it should always and necessarily be followed by a parallel legal right. If the personhood theory cannot justify the existence of a moral right, then a legal right should not follow either.

However, the failure to make the distinction between moral and legal rights is regrettable. A moral right is created when there are sufficient moral interests to something, which are not undermined by other conflicting moral considerations. Only if a legal body decided that this moral right should also be legally protected and be enforceable would this turn into a legal right as well.<sup>205</sup> Thus, although moral and

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<sup>204</sup> Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights'.

<sup>205</sup> Joseph Raz, 'Legal Rights', *Oxford Journal of Legal Studies*, 4/1 (1984), 1 at 14.



legal rights are connected, the two are also different. The justifications for the existence of a moral right usually play a role in the decision of the legislature to create an equivalent legal right, but additional factors are also taken into account as well. The most important of these factors concerns the appropriateness of the judiciary to decide certain issues and points to the fact that not every moral right should also be converted into a legal one. A moral right might protect important interests, which should nevertheless not be the concern of the law, because the Courts are not always appropriate institutions to deal with morality's demands. It is for this reason that although parents have a fundamental interest in the love of their children, and there may even exist a moral right to that effect, no institution should convert that into a legal right and attempt to enforce it. As Allen Buchanan very well put it, '[j]ustifying assertions about the existence of certain moral rights is one thing; justifying an institutionalized system [...] to realize them is quite another.'<sup>206</sup> The second difference between moral and legal rights is that the two facets result in different types of remedies. Not converting a moral right into a legal one does not mean that no right exists; it simply suggests that any recourse for a failure of the duty-bearer to comply with his obligations rests in morality rather than legal sanctions. Thus, the violation of moral rights will at most result in the social condemnation of the violator, while the violation of legal rights will also have legal consequences: it might lead to criminal sanctions or a change in the law or practices of the government.

Nevertheless, the rejection of Griffin's view that legal rights accurately mirror moral ones does not automatically support Buchanan's position that the two facets of rights should be completely disconnected from each other.<sup>207</sup> In fact, Buchanan's argument that moral rights are neither necessary nor sufficient for the justification of legal rights is only partly persuasive. It has already been argued that moral rights are not in themselves sufficient to justify legal rights, but Buchanan offers an additional reason for why that is the case. He argues that even if philosophers could produce a comprehensive and sound theory of moral rights, this would fail to justify some of the most important legal human rights that exist. This is because, according to Buchanan, some rights, like the right to healthcare cannot be grounded in corresponding moral rights because the legal right is broader than the moral one. He bases this argument on

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<sup>206</sup> Allen Buchanan, *The Heart of Human Rights* (New York: OUP, 2014) at 51.

<sup>207</sup> Ibid.

the premise that in the case of a moral right, the right-holder is entitled to the performance of the correlative duties only if there is something about him that makes him so entitled. To put it in interest terms, Buchanan rejects the idea that general interests can also support the existence of a moral right; only individual interests can justify moral rights. Since some moral rights make huge demands from the state, they cannot be morally justified by only referring to a single right-holder's interests. Such a problem does not exist with legal rights since the legislature can rely on additional, more general justifications, to explain their existence. For example, the legal right to free healthcare under the International Covenant on Economic Social and Cultural Rights requires that hospitals are built, doctors and nurses are trained and a considerable amount of money is spent in the process. Since a single individual cannot morally demand all these things from the state, if there is a moral right to health, it is narrower in scope than its legal equivalent.

Buchanan's claim is only persuasive if one abandons the idea that common goods can also justify moral rights, which I reject. Nevertheless, for reasons explained above, his conclusion that moral rights are not in themselves sufficient to ground legal rights is convincing. The real problem with Buchanan's thesis that moral and legal rights should be completely disconnected rests in his claim that it is possible to justify some legal human rights without referring to their moral equivalents at all. Accordingly, he argues that the legal right to health should exist because its protection can contribute to social solidarity, help realise the ideal of a humane society and increase productivity among the population – but not because there is a moral right to health.<sup>208</sup> However, while these utilitarian justifications explain why having free healthcare would be a good social practice, they do not offer sufficient explanations for why it should also be a right afforded to every individual. Rights are *primarily* about protecting individual interests; general interests can enhance the importance of the protection of certain rights, but they cannot in themselves justify them. Despite the key distinctions that exist between moral and legal rights, an important element that should always unite them is that at least part of their justifications – the part that is concerned with the interests of individuals – should be the same.

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<sup>208</sup> Ibid.

Buchanan's thesis' deficiencies aside however, there are good reasons why legal and moral fundamental rights should remain separate; key among them is the need to distinguish between those rights that can appropriately be protected by the judiciary and those that are better left in the moral realm. This distinction is not only philosophically sustainable, but it is also practically important for the conclusions of this thesis, which are only concerned with the relationship between peace and the protection of *legal* human rights. The choice to restrict my analysis in this way was not an arbitrary one; rather, like with the three other choices discussed in this chapter, it is intended to reflect the way peacebuilders themselves understand the term 'human rights'. When UN reports refer to 'human rights', they do not explicitly restrict themselves to their legal protection; nevertheless, the examples they offer of how human rights can contribute to peace always seem to focus on their legal, rather than moral, facet.<sup>209</sup> For instance, *An Agenda for Peace* refers to the need to 'identify and support structures which will tend to consolidate peace' and uses monitoring elections and the protection of human rights as examples.<sup>210</sup> Elsewhere in the report there are other mentions of professionals who can help in peacebuilding operations; these include human rights monitors and electoral officials, in other words, those who are concerned with the implementation of *legal* human rights.<sup>211</sup> Finally, the Brahimi Report recommends that the Office of the High Commissioner for Human Rights increase its peacebuilding efforts by creating 'model databases for human rights field work'.<sup>212</sup> Nowhere in these key UN documents are there signs of moral human rights being perceived as important peacebuilding tools.

This emphasis of UN reports on legal human rights is also reflected in the peacebuilding operations in the ethnically divided, post-conflict societies themselves. While, for example, there has been a growing literature on the importance of moral rights in relation to peace education,<sup>213</sup> and even some small scale grassroots attempts

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<sup>209</sup> UN Secretary-General, 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', (New York: United Nations, 2004) at [7].

<sup>210</sup> UN Secretary-General, 'An Agenda for Peace' at [55]. The emphasis on structures is also apparent in UN Secretary-General, 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' at [2].

<sup>211</sup> UN Secretary-General, 'An Agenda for Peace' at [52].

<sup>212</sup> Panel on United Nations Peace Operations, 'Brahimi Report' at [244]. Also see [324] of the same report for a similar comment.

<sup>213</sup> Lesley McEvoy and Laura Lundy, 'In the Small Places': Education and Human Rights Culture in Conflict-Affected Societies', in John Morison, Kieran McEvoy, and Gordon Anthony (eds.), *Judges*,

to apply the theoretical findings in practice,<sup>214</sup> the overwhelming attention and resources of peacebuilders are still focused on the contributions of legal rights. This is not surprising: moral rights are not as intellectually disciplined or clear in their content as their legal equivalents, thus making them susceptible to (ab)use by politically partisan groups seeking to undermine the peace process, a danger that peacebuilders are, understandably, keen to avoid. Of the three case studies, South Africa stands out as moral rights have played a more important role in its peacebuilding attempts: they were traditionally used by those opposing apartheid and the Final Constitution tasks the Human Rights Commission with building a ‘culture of human rights’ in the country.<sup>215</sup> Nevertheless, even in South Africa, the rights to property and vote on which this thesis focuses, have almost exclusively been the concerns of legal institutions, such as the Commission on Restitution of Land Rights, the Electoral Commission and the Constitutional Court. Considering that the purpose of this chapter is to devise a definition of how human rights are perceived and understood by peacebuilders themselves, their biases in terms of the types of rights they seek to protect should inform the definitional exercise.

For the purposes of this thesis therefore, human rights are tools that protect fundamental interests in the legal sphere; in other words, they make it possible to safeguard such interests by adjudicating them in courts of law or debating them in legislative forums. They come into existence through a different process than moral rights and each results in different remedies. However, these distinguishing characteristics between them do not mean that the two are not linked in any way. Legal and moral rights are connected by the fact that they both seek to protect the interests of the individual, albeit in different arenas. Despite their connections, this thesis focuses only on legal rights, as it is they that have monopolised the attention and resources of peacebuilders on the ground.

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*Transition, and Human Rights* (Oxford: OUP, 2007); Felisa Tibbits, 'Understanding What We Do: Emerging Models for Human Rights Education', *International Review of Education*, 48/3/4 (2002), 159.

<sup>214</sup> Sara Clarke-Habibi, 'Transforming Worldviews: The Case of Education for Peace in Bosnia and Herzegovina', *Journal of Transformative Education*, 3 (2005), 33.

<sup>215</sup> Constitution of the Republic of South Africa [No. 108 of 1996] (henceforth SA Constitution), Section 184(1)(a).

## **5. Domestic and international legal human rights**

Peacebuilding reports frequently refer to the need to protect human rights in ethnically divided, post-conflict societies, but they never clarify whether by that they mean domestic or international protection. Practice on the ground is also ambivalent: peace agreements are usually accompanied by accession to an array of international human rights treaties, while at the same time, there is an increased focus on the strengthening and professionalisation of the domestic judiciary. This ambiguity could be explained by the fact that superficially the two categories of human rights look alike since they even tend to be worded in the same way. Nevertheless, a distinction between domestic and international human rights is necessary due to institutional and normative differences between them; in turn, these affect the way in which each relates to peace. However, while it is important to be aware of the differences between domestic and international rights, it is less easy to clearly distinguish between the two in practice. Constitutional Courts interpreting domestic human rights can be influenced by international practices and jurisprudence, while international courts tend to take into account the specific context of the country in which their judgement will be implemented, thus creating overlaps between the two spheres.

In *The Law of Peoples* Rawls distinguishes between ‘constitutional rights’ and ‘human rights’, by which he means international human rights, and argues that the purpose of the latter is to ‘restrict the justifying reasons for war and its conduct, and [...] specify limits to a regime’s internal autonomy.’<sup>216</sup> Accordingly, if a regime violates international human rights, it loses its legitimacy and authority to prevent the international community from intervening in its internal affairs: the international community can publicly criticise the regime’s actions, impose diplomatic and economic sanctions, or in particularly grave cases use military force in the name of human rights protection. While the purpose and nature of constitutional rights is left unclear, Rawls argues that their content and extent of protection are broader than those of international human rights. This argument has one great advantage: by putting the emphasis on national sovereignty rather than the protection of the individual, it provides a clear reason for the distinction between domestic and

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<sup>216</sup> John Rawls, *The Law of Peoples* (Cambridge, Mass: Harvard University Press, 1999) at 79.

international rights. To put it in interest terms, human rights arise because they promote certain interests, which weigh more heavily than any other contradicting considerations that might exist. The reason domestic human rights generally attract greater protection than international ones is due to the contradicting consideration of protecting national sovereignty, which is a factor on the international, but not on the domestic plane.

However, while the emphasis on national sovereignty makes an important contribution in explaining the distinction between domestic and international human rights, Rawls' theory is ultimately unpersuasive for two reasons. First, Rawls does not offer any guidelines as to how to determine which rights are international human rights other than the fact that they should be universally accepted.<sup>217</sup> As a result, he mentions that the right to freedom from slavery and serfdom and the right to liberty (but not equal liberty) of conscience should be protected, but offers contradictory guidance about what else should be included in the list of international human rights.<sup>218</sup> For instance, he argues that 'the right to life (to the means of subsistence and security)' should be protected on the international plane, but he subsequently restricts human rights protection to the much more limited 'security of ethnic groups from mass murder and genocide'.<sup>219</sup> The second problem with Rawls' theory is that in addition to not being clear about the human rights it applies to, it does not accurately describe the actual international human rights practice. For instance, it does not account for the practices of monitoring and reporting of international human rights, which regularly take place and infringe on national sovereignty even in cases of minor violations. Moreover, it does not explain the role in the protection of human rights of other international players, such as non-governmental organisations, which tend to be particularly active in peacebuilding contexts.<sup>220</sup>

Nevertheless, while Rawls' theory is underdeveloped and ultimately unpersuasive, there are good reasons why a distinction between domestic and international rights should be maintained, both on the institutional and the normative level. On the institutional level, international bodies cannot make the same demands for the

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<sup>217</sup> Ibid.

<sup>218</sup> Ibid., at 65.

<sup>219</sup> Ibid., at 65 and 79 respectively.

<sup>220</sup> Charles R. Beitz, *The Idea of Human Rights* (Oxford: OUP, 2009) at 101.

protection of human rights as domestic bodies because they do not have an equally developed framework to support them. While domestic courts have the backup of effective sanctions, international courts have to rely on the goodwill of the state parties for the enforcement of their decisions. Sanctions are in principle available to international bodies as a way of encouraging enforcement, but political and diplomatic considerations often make them unavailable in practice. Among international human rights bodies, by far the most institutionally developed and therefore most likely to produce the most ambitious jurisprudence is the ECtHR, yet even that has resulted in restrictive case law and an inability to enforce its decisions where the interests of the state are seriously threatened. In contrast, if the ruling of a domestic court is ignored, this can result in a constitutional crisis, which could have serious repercussions, potentially challenging the foundations of the country's Constitution and democracy. Consequently, international courts, being aware of their limitations, take this factor into account and are more likely to confer a margin of appreciation to the respondent state than domestic ones.

Moreover, international Courts are reluctant to interfere in a state's national sovereignty when the circumstances of the case are in some way unique or when the right in question has varying interpretations in different member states. Thus, the ECtHR has stated that a wide margin of appreciation will be afforded to the respondent state when 'there is no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it'.<sup>221</sup> This is again, due to an acknowledgement by the European Court of its inherent institutional limitations: its judges, who come from different member states often lack the expertise and domestic knowledge to understand the context in which a decision will be applied or the way a certain issue will be perceived by the society more generally. Because of these limitations in their understanding of the case, international judges rightly often defer to the domestic authorities. As a result, the Court has held that '[b]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion' on certain

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<sup>221</sup> *Evans v. United Kingdom* (2008) 46 E.H.R.R. 34 at [77].

controversial issues, such as moral or ethical issues.<sup>222</sup> Thus, a further potential difference between domestic and international rights is that the former tend to be considered more legitimate by the public because there is less of a sense that outsiders are intervening in their domestic affairs.

The institutional reasons for adopting a more restrictive interpretation of international rights, even if their wording is identical to that of constitutional rights, stem from one normative reason, namely the importance of national sovereignty. International human rights give effect to different interests that merit protection, but these interests have to be balanced against contradicting considerations of respecting national sovereignty. The extent to which such national sovereignty considerations can act as a ‘conversation stopper’ to allegations of human rights is a matter of degree: it depends on the seriousness of the violation, the ability of the international community to react to that violation, its perceived legitimacy and impartiality and the type of intervention envisaged. Sometimes a state will not be able to use the principle of national sovereignty to defend itself from criticism or from the legal consequences that stem from rights violations, but that principle is something that should always be taken into account and shape the distinction between domestic and international rights. There is nothing morally wrong with this proposition: each country should have the power to determine its own ‘basic political culture’ and to make up its own policy decisions. Unless such policies seriously affect international human rights, it should not be the responsibility of the international community to intervene, even if the domestic courts could (according to the international community’s assessment) have acted differently.

The distinction between domestic and international rights might seem counter-intuitive to those who seek to maximise human rights protection on the global level, but it is reflective of how human rights operate in practice. In order to come up with a coherent description of international human rights practice, some basic facts about the world need to be taken into account. These include the fact that the world consists of a system of territorially defined political units, each claiming to exercise legitimate political authority within its borders. Thus, to quote Beitz:

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<sup>222</sup> *Handyside v. United Kingdom* (1979-80) 1 E.H.R.R. 737 at [48].



‘any plausible view of the justifying purposes of a practice of human rights must be compatible with the fact that the state constitutes the basic unit of the world’s political organization. A theory of human rights is not a theory of ideal global justice.’<sup>223</sup>

Moreover, the emphasis on national sovereignty acknowledges that even justified international interventions in a country’s domestic affairs are always accompanied by the danger that human rights language and institutions can be abused by States in order to interfere in another’s national affairs. It is for this reason that international courts have rightly tended to be even more deferential when deciding cases influencing national security considerations, which go to the heart of national sovereignty. This danger is confirmed by Raz who argues that international human rights should not be determined ‘merely by the moral limits to the authority of states, but also by the possibility of morally sound interference by others.’<sup>224</sup>

However, while the distinction between domestic and international rights is clear in theory, it starts fading when applied to practical situations on the ground. For example, a first glance to the Cypriot and South African jurisprudence would indicate that the former is based on international and the latter on domestic human rights protections. Yet a closer look points to a more nuanced picture: while the majority of Cypriot cases are being dealt with at the ECtHR level, a recent development, the Immovable Property Commission, is made up by both domestic and international judges. Moreover, South African human rights jurisprudence is exclusively developed by domestic courts, yet the Constitution states that when interpreting the Bill of Rights, they ‘must consider international law’.<sup>225</sup> This provision has been applied by the Constitutional Court, which has, for example, stated in a case concerning the right to vote, that ‘[i]nternational and regional human rights instruments provide a useful guide in understanding the duty to facilitate public involvement in the context of our country.’<sup>226</sup> However, it is the Bosnian case study that intertwines domestic and international human rights law the most. On the one hand, the country is a member to

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<sup>223</sup> Beitz, *The Idea of Human Rights* at 128.

<sup>224</sup> Joseph Raz, ‘Human Rights without Foundations’, in Samantha Beeson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: OUP, 2010) at 331.

<sup>225</sup> SA Constitution, Section 39(1)(b).

<sup>226</sup> *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT 12/05) [2006] ZACC 11 (17/08/2006, SA CC) at [89].

a number of international human rights treaties and different bodies of the Council of Europe have taken an active interest in reforming its Constitution. On the other, while it enjoys a strong Constitutional Court, this consists of 3 international judges in addition to the 6 Bosnian nationals.<sup>227</sup> Moreover, the efforts to protect property rights in the country were initiated by the High Representative, an internationally appointed official, but eventually the project was completed by the Bosnian local authorities.

Ultimately, the distinction between domestic and international rights should be made clear, irrespective of whether in practice the two tend to overlap, since their differences can affect the way in which each contributes to peace. They are interpreted by different bodies, are affected by varying considerations and, as a result, they have distinct characteristics. Domestic rights are generally more broadly interpreted, more readily enforced and usually considered more legitimate by the people than international ones. At the same time, the distance between international judges and the country in question can give them perspective, minimise perceptions of ethnic bias and provide them with greater knowledge of international practices. The context of the conflict and the extent of the international community's involvement in the broader peacebuilding operation are likely to determine whether human rights protection will mostly take place on the domestic or international level, and as a result, affect their specific relationship to peace.

## **6. Conclusion**

My aim in this chapter was to show that contrary to the international community's assumptions, the term 'human rights' is in need of a definition and to offer one that would be helpful in determining the relationship between it and peace. The most appropriate method in this respect was not to argue for the best philosophical account of human rights, but to opt for that definition which is accepted and used by peacebuilders themselves. Therefore, drawing from peacebuilding reports and practices, I concluded that human rights are about protecting *interests* that are *fundamental* in nature, through *legal means*. Such protection can take place on the *domestic* or the *international level* with the two frequently coexisting and affecting

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<sup>227</sup> Constitution of Bosnia and Herzegovina, Annex 4 of the General Framework Agreement signed on 14 December 1995, Article VI.1.a.

each other, but ultimately remaining distinct. This definition has been derived by making certain choices and as a result, leaving out characteristics of human rights that could also be helpful in peacebuilding processes. For example, had I defined human rights as morally, in addition to legally, protected fundamental interests, it would be possible to determine a relationship between them and peace, which would be different to the one proposed in the following chapters. Nevertheless, such a definition would be less useful because it would be compromising clear and robust conclusions for the sake of inclusiveness, thus making little progress over the existing assumptions about the relationship between the two terms. Moreover, it would be less relevant to policy makers on the ground, who have favoured the legal protection of human rights as their preferred peacebuilding tool.

This definition of human rights already points to a number of conclusions about the relationship between them and peace. On the one hand, if each human right protects numerous and sometimes conflicting fundamental interests, various human rights can have different types of relationships with peace. Furthermore, what we mean by human rights slightly varies from country to country depending on whether peacebuilders have preferred to use domestic or international human rights. These characteristics make it necessary to examine the effect of particular rights in specific contexts, an exercise that is undertaken in Chapters 5, 6 and 7. It is however possible and desirable to reach some more general conclusions about the relationship between peace and human rights as well. For instance, since human rights are about the *legal* protection of fundamental interests, their peacebuilding effects are likely to be felt through the amendment of laws and by changing state practices and the workings of public bodies; ultimately, their contributions are concerned with institutional changes, rather than with how these are perceived by the people on the ground. Related, is the fact that human rights tend to focus on the peacebuilding contribution of lawyers and policy makers, as opposed to that of other professionals, such as teachers, religious leaders or psychologists. These more theoretical conclusions, which already start pointing to a more qualified understanding of the assumed positive relationship in question, are explored in more detail in the next chapter.

## **Chapter 4: The relationship between human rights and peace**

### **1. Introduction**

A better understanding of what we mean by the terms peace and human rights challenges the perception that the relationship between them is simple, without need of justification, and always positive. Rather, it points to different, and sometimes conflicting, connections between the latter and each of the three elements. Human rights can be promoted, but also restricted in the name of security and while they are often perceived as synonymous with justice, they might also inadvertently undermine it. For example, human rights can help criminalise and prosecute dangerous conduct, thus promote security, but they might also have to be limited in light of public safety considerations. Similarly, protecting them ensures that injustices will not be repeated in the future, but their inability to reflect the subtleties of the conflict – where for example a person is both the perpetrator and the victim – can also undermine feelings of justice. Finally, in addition to these positive and negative connections, it is also possible that there is no relation at all between the elements, especially reconciliation, and human rights: either peace can be promoted through mechanisms and tools that are unconnected to human rights altogether, or, in those cases that human rights have a contribution to make, this is relatively specific. They will only induce legal and institutional amendments and ignore political, socio-economic and psychological changes that are also necessary to build peace.

This analysis provides the first evidence against the liberal peacebuilding approach, of which human rights are at the centrepiece. Liberal peacebuilding assumes that institutional and legal amendments more-or-less automatically result in changes to the perceptions of the public and lead to peace. Nevertheless, the different types of connections between security, justice, reconciliation and human rights, coupled with the fact that these elements sometimes contradict between themselves, suggest that the relationship in question is more nuanced and the journey towards peace more difficult to navigate than liberal peacebuilders believe. In particular, it transpires that even when human rights can help, they are unable to build peace on their own and they have to be supplemented by other tools and mechanisms as well. Finally,

disputing the liberal assumption that there is one peacebuilding recipe that fits all, the chapter argues that in order for human rights to build peace as effectively as possible, they have to operate under certain conditions and within a given context. Thus, bearing in mind that ethnically divided societies differ significantly between themselves, the extent to which human rights can contribute to peace in each of them is also likely to vary.

## **2. The relationship between human rights and security**

Security exists when people are feeling safe from physical threats, such as war, internal conflict and serious crime, issues that are generally dealt with through targeted policies and coordinated governmental action. Consequently, at a first glance, human rights, with their primary focus on the interests of individuals and their capacity to be enforced through judicial decisions, do not seem to relate much to security. However, upon further inspection, it transpires that security and human rights are connected both in positive and negative ways. If security is understood as a negative concept, it requires the non-interference of the state with a person's fundamental interests. Under this definition, the greatest threat to security is posed by the state itself and human rights can help curb its power. Alternatively, security can be understood as a positive concept, which can only be promoted if the state takes action, sometimes human rights limiting action, against external threats.<sup>228</sup> These conclusions contradict the assumption of a merely positive relationship between human rights and peace. In any case, even in situations where human rights can contribute to security, this depends on some security already being present in the country; human rights cannot simply start building it from scratch.

Despite expectations that the protection of human rights results in greater security in post-conflict societies, often the most effective security-promoting methods are not connected to human rights at all. Human rights are primarily concerned with protecting the interests of individual right-holders rather than the general well being.

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<sup>228</sup> Liora Lazarus, 'The Right to Security – Securing Rights or Securitising Rights?', in Rob Dickinson et al. (eds.), *Examining Critical Perspectives on Human Rights* (Cambridge: CUP, 2012); Piet Hein Van Kempen, 'Four Concepts of Security: A Human Rights Perspective', *Human Rights Law Review* 13/1 (2013), 1.

Security threats on the other hand, are usually felt by the society as a whole and are more effectively resolved through coordinated governmental action. For example, the single most important step that increased feelings of security among Greek Cypriots was Cyprus joining the EU. One of the conditions that had to be met in order to join the EU was the protection of human rights; nevertheless, this was not a major consideration or hurdle for the Cypriot government or people, since Cyprus already had a long record of respect for human rights.<sup>229</sup> The decision to join the EU was a political one and required the coordination of a number of governmental bodies; it was a policy decision, which neither could nor should be instituted by the Courts or by applicants advocating their individual interests.<sup>230</sup>

Similarly, the best way to promote security in South Africa (SA) is to improve police and prison services so that they can deal with the high crime rates and challenge the culture of violence that exists in the country. Case law dealing with the shortcomings of existing practices in relation to human rights might help promote these objectives incrementally, but political decisions for sweeping changes are likely to be more effective. Making the police service more efficient, reducing the high number of firearms that exist in the country and better organising the criminal justice system are among the policies that, although unconnected to human rights, could make important contributions to security. The limited effect that human rights protections can have on security is also confirmed by the NATO-led SFOR (Stabilisation Force) military mission and its follow-up EUFOR Althea mission in Bosnia and Herzegovina (BiH).<sup>231</sup> The main objective of both missions was ‘to maintain the safe and secure

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<sup>229</sup> European Commission, 'Regular Report from the Commission on Cyprus' Progress Towards Accession' (Brussels: European Union, 1998) at [http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/1998/cyprus\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/cyprus_en.pdf).

<sup>230</sup> A similar conclusion was reached in an English case, in which the applicant tried to use the Courts in order to stop the UK government from ratifying the EU Lisbon Treaty without a referendum. The Court, rejecting the applicant's argument, stated: 'The subject-matter, nature and context of [the issue at hand] place it in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter.' (*R (on the application of Wheeler) v. Office of the Prime Minister* [2008] EWHC 1409 (Admin) at [41].)

<sup>231</sup> The two missions were/have been involved in demining, weapons collections and searches, support to the ICTY through detention of persons indicted for war crimes, law enforcement, border control and training. (Cornelius Friesendorf and Susan E. Penksa, 'Militarized Law Enforcement in Peace Operations: EUFOR in Bosnia and Herzegovina', *International Peacekeeping*, 15/5 (2008), 677.)

environment in BiH', yet neither of their mission statements makes any reference to human rights protections at all.<sup>232</sup>

Moreover, victims of human rights violations during wartime are likely to be afraid of the recurrence of violence, even if such a scenario is in the eyes of outsiders objectively unlikely. However, human rights empower Courts to only act against obvious and objectively recognised threats. Vague and general fears among the population about their physical security might be genuine and be felt very strongly, but they cannot be dealt with through the protection of human rights. Thus, it is unlikely that their protection will make any meaningful contributions in situations where security (and peace more generally) requires that psychological change takes place. For example, it has been suggested that some Bosniacs are still concerned about a Croatian military attack to their country, especially now that Croatia has joined the EU and is more powerful than ever.<sup>233</sup> Unrealistic as this scenario might be, it promotes feelings of insecurity among the population, yet human rights cannot really do much to alleviate them. What are needed instead are coordinated strategies that affect the whole of the country and have a real impact on the ground. Such security-promoting mechanisms, include demining, disarmament of ex-combatants and their reintegration into society, dealing with the organised crime that emerged during the conflict and developing good political relations with ex-enemies.

While a number of security-promoting measures are not related to human rights at all, to the extent that the two are connected, their relationship can be both positive and negative. The main way in which human rights can positively contribute to security is through those rights traditionally understood as 'negative rights' and which were intended to promote freedom from fear by outlawing sources of insecurity. Such rights include the right to life and freedom from torture, which acquire a particularly important role in post-conflict contexts where their violations were frequent occurrences. The simplest way in which these human rights contribute to security is by empowering the Courts to convict and imprison their violators. In this way the

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<sup>232</sup> Their mission statements are available at <http://www.nato.int/sfor/organisation/mission.htm> and [http://www.euforbih.org/index.php?option=com\\_content&view=article&id=15&Itemid=134](http://www.euforbih.org/index.php?option=com_content&view=article&id=15&Itemid=134) respectively [accessed on 30 May 2014].

<sup>233</sup> Speech by Mr. Christopher Bennett, the Deputy High Representative, at the launch of Lord David Owen's book *Bosnia and Herzegovina: Ways Forward* (London School of Economics, 11 June 2013).

victims are likely to feel safer knowing that they cannot be harmed by their tormenters again and the general public is more secure in the knowledge that dangerous individuals are now powerless to take the country back into conflict.<sup>234</sup> Examples of such use of human rights include convictions of perpetrators of international crimes during the war by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Bosnian domestic courts. Moreover, human rights can contribute to feelings of security when they are included in the Constitutions of post-conflict States and act as reminders that human rights violations of the past will not be tolerated in the future. In this sense, the South African Constitution is telling: making explicit references to its violent apartheid past, it protects, in addition to traditional human rights, 'the right to freedom and security of the person, which includes the right ... to be free from all forms of violence from either public or private sources.'<sup>235</sup> However, while in itself inspiring, the stark contrast between the constitutional provision and the high levels of insecurity in the country (mostly due to violent crime), acts as a reminder that it is not the legal text that is important, but the effect it actually has on the ground.

These examples show the positive contributions that human rights can make to security, but they also point to their limitation: in order for human rights to be able to contribute to this objective, some security must already be present on the ground. Their protection cannot build security from scratch. While for example, the ICTY started operating in 1993 with the express objective of helping to stop the war in the Balkans and promote security in the region, the single most deadly attack in BiH, the Srebrenica massacre, took place in 1995.<sup>236</sup> In the midst of the utter chaos that was the Bosnian war, legal protections of human rights could achieve nothing; it was necessary for some security to be established through other means – in this case the NATO bombings, which paradoxically also undermined security – before their effect could be felt. Moreover, despite the legal protection of a number of rights relating to

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<sup>234</sup> Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', *Harvard International Law Journal*, 46/2 (2005), 295.

<sup>235</sup> Constitution of the Republic of South Africa [No. 108 of 1996], Section 12(1)(c). While the international human right to security is almost always included in human rights treaties, it has rarely been recognised as self-standing, since it is usually coupled with the right to liberty. (James Spigelman, 'The Forgotten Freedom: Freedom from Fear', *International & Comparative Law Quarterly*, 59 (2010), 543.)

<sup>236</sup> United Nations Security Council Resolution (UNSCR) 827 (25 May 1993).



freedom from fear in the South African Constitution, feelings of insecurity remain high in the country. What is needed is to promote security by dealing with high crime rates through other means, and when that has yielded results, the protection of human rights will be able to make greater contributions to the security objectives.

In any case, while security can be promoted through the protection of human rights, it is also possible, especially in post conflict contexts, that it will make rights-limiting demands as well. This happens when one adopts a positive conception of the term, which requires that the state takes steps in order to protect citizens from external threats. It is under this positive conception of security that general interests that can limit human rights acquire their legitimacy: for example, it is acknowledged that the state must take action, even human rights-limiting action, when that is necessary and proportionate for the protection of, inter alia, 'national security', the 'maintenance of public safety' and the 'prevention of disorder or crime'. Especially in national security situations, courts have given the authorities a wide margin of appreciation or deference, to the detriment of human rights protections.<sup>237</sup> This tension between security and human rights becomes most apparent when states formally derogate from their human rights obligations because they perceive the harm they are trying to avoid to be so immediate and serious that it is 'threatening the life of the nation'.<sup>238</sup> Thus, in addition to the non-existent and positive connections between human rights and security (and consequently peace), there is a very real negative one as well.

Problematically, however, the idea that security can also undermine human rights does not seem to have been appreciated much. For instance, the Inter-American Commission on Human Rights has published a report discussing the importance of 'citizen security' in the region.<sup>239</sup> It argues that citizen security is undermined whenever the State fails to protect its population from crime and social violence. Further, it lists a number of rights, such as the right to life, personal liberty and

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<sup>237</sup> *Handyside v. United Kingdom* (1979-80) 1 E.H.R.R. 737 at [48]-[49].

<sup>238</sup> European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, Article 15. For an excellent analysis of how security arguments and derogations should be treated with caution because of their detrimental effects on human rights, see Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: CUP, 2006).

<sup>239</sup> Inter-American Commission of Human Rights, 'Report on Citizen Security and Human Rights', (Washington DC: Organisation of American States, 2009).

security, fair trial and property, and persuasively argues that their protection is integrally linked to citizen security. However, it fails to point out that the most frequently used way in which citizens are protected from crime and social violence is through the criminal law, which can also result in the limitation of human rights, especially when it is used excessively and without the necessary safeguards. An overuse of the criminal law might increase citizen security, but could potentially also be detrimental to the human rights of the people, and in particular to the rights of those who tend to be disproportionately targeted by the authorities in relation to the rest of the population (young men of specific ethnic/racial origins).<sup>240</sup>

Another example in which a positive conception of security requires the limitation of human rights becomes obvious through the ‘peace v. justice’ debate. In 1996 and shortly after the Dayton Agreement ending the war in BiH had been signed, an influential and anonymous article was written by one of the people involved in the negotiations.<sup>241</sup> It argued that the international community’s insistence on the protection of human rights delayed the conclusion of the peace agreement and prolonged the insecurity of a number of victims on the ground. Conversely, there have been arguments that unless human rights are protected, the war is likely to resume, so a peace agreement that is negotiated to the detriment of real human rights protections promotes security only temporarily and in a superficial way.<sup>242</sup> This debate has been labelled the ‘peace v. justice’ debate, with advocates of ‘peace’ arguing that security should have priority over human rights protection and proponents of ‘justice’ contending the opposite. Attempts have been made to downplay the differences between the two points of view by arguing that they are not necessarily incompatible with each other: the objective, irrespective of what is being prioritised by each school of thought, is always to achieve ‘peace with justice’ because ‘the absence of justice is often the primary reason for the absence of peace’.<sup>243</sup> However, the observation that often security cannot be achieved without protecting human rights does not negate the

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<sup>240</sup> Jeremy Waldron, ‘Security and Liberty: The Image of Balance’, *Journal of Political Philosophy* 11 (2003), 191.

<sup>241</sup> Anonymous, ‘Human Rights in Peace Negotiations’, *Human Rights Quarterly*, 18/2 (1996), 249.

<sup>242</sup> Christine Bell, *Peace Agreements and Human Rights* (Oxford: OUP, 2000).

<sup>243</sup> Michelle Parlevliet, ‘Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management’, *Track Two Occasional Paper* 11(1), (Cape Town: Centre for Conflict Resolution, 2002), 1 at 11; Also see, UN Secretary-General, ‘Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, (New York: United Nations, 2004) at [21].

fact that, especially in post-conflict situations, security also makes rights-limiting demands, thus sometimes requiring the prioritisation of one over the other.

This analysis suggests that the relationship between security and human rights consists of a lot more than merely a positive connection between the two. In addition to the expected positive contributions that human rights can make to security, it is also possible that the two are unconnected or that the promotion of security will require the limitation of human rights. Moreover, even in cases where there is a positive relationship between the two, the ways in which human rights can help are quite limited and specific. Security's demand that people must be feeling safe from physical threats requires both that they are objectively secure and that people's subjective feelings reflect that. While however, human rights can take some steps in terms of the former, their contribution to the latter is minimal. They might be well-suited in dealing with the legal and institutional demands of peace, but not the psychological ones. Finally, for human rights to promote security it is necessary that other mechanisms have already been used and some security has already been established. Building security from scratch is something that can only be achieved through genuine political willingness to abandon arms, which human rights cannot replace.

### **3. The relationship between human rights and justice**

Post-conflict justice, it was argued in Chapter 2, is promoted by ensuring that the injustices of the past are remedied and are not repeated again in the future. Its positive connection to human rights is often assumed rather than justified, so this section aims to explain in what specific ways one can promote the other. It argues in particular that the legal nature of human rights empowers victims to demand, and not merely hope, to be remedied for past injustices and judicially guarantees their non-repetition in the future. Nevertheless, in order for such contributions to be made, it is necessary that certain conditions, such as that the parties have agreed on a peace settlement, are satisfied. Moreover, these positive connections between human rights and justice should not cloud the fact that the latter might also explicitly require, or at least inadvertently lead to, the limitation of the former. Finally, this section draws attention to instances of injustice that cannot always be labelled as human rights violations,

thus leaving a gap in the peacebuilding operation that will have to be addressed by alternative methods.

The idea that human rights and justice are positively connected originates from the preambles of human rights conventions themselves, which are almost always based on the premise that human rights protection is ‘the foundation of freedom, justice and peace in the world’. These preambles were inspired by the experiences of the Second World War and the need to create mechanisms to ensure that the injustices perpetrated during that period were not repeated again. Over the years, the connection between justice and human rights has been repeated so often that it has sometimes even been assumed that the two concepts are identical or that utterances of their positive relationship are not in need of justification. For example, when writing on the growth of the human rights doctrine, Michael Akehurst made the seemingly uncontroversial observation that ‘[i]t was only after the United Nations Charter was signed in 1945 that any attempt was made to provide comprehensive protection for all individuals against all forms of injustice.’<sup>244</sup> Similarly, despite Paul Gready’s critical approach towards transitional justice and his urging to reconceptualise the concept in order to make it more useful in practice, he casually conflates it with human rights by arguing that ‘[h]uman rights and justice are seen as an alternative to war.’<sup>245</sup> However, such broad statements are ultimately unhelpful because they hide more than they illuminate about the relationship in question.

Rejecting this general positive relationship, I argue that human rights can contribute to the promotion of justice in three specific ways. When we are referring to injustices that take place during conflicts, we usually mean killings, forceful taking of properties and acting in a discriminatory way against certain groups of people, all of which can be expressed as human rights violations as well. Thus, the first important contribution that human rights can make to justice is to provide the legal tools for victims to demand that they are remedied for the injustices that took place during the war. Claims of injustices through the human rights vocabulary are particularly likely to be heard and remedied because of the legitimacy attached to them and the stigma that is

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<sup>244</sup> Michael Akehurst, *A Modern Introduction to International Law* (6<sup>th</sup> edn.; London: Routledge, 1987) at 76.

<sup>245</sup> Paul Gready, 'Analysis: Reconceptualising Transitional Justice: Embedded and Distanced Justice', *Conflict, Security and Development*, 5/1 (2005), 3 at 18.

associated with their violations.<sup>246</sup> Take for example the injustices that were committed during apartheid South Africa: the international community reacted to them in the strongest terms and started imposing economic sanctions against the apartheid government after they were described as human rights violations in the Apartheid Convention.<sup>247</sup>

A related advantage to being able to label various injustices as human rights violations is that their legal nature can push unwilling politicians to start remedying them. This is particularly important in post-conflict societies where at least some of the players are likely to be uncooperative and resist change towards peace. Remedying injustices is not only important for applicants who are likely to be directly affected, but it also has a strong communicative effect on the rest of the population.<sup>248</sup> Ideally, it sends the message that things are changing and that this is a new, more legitimate state of affairs that deserves the support of the people.<sup>249</sup> For instance, the complaint by a group of South Africans that they should have been consulted before a legislation directly affecting their interests was passed, led the Constitutional Court to invalidate the law and order that a consultation procedure take place before it was redebated.<sup>250</sup> In its reasoning, the Court explicitly contrasted the democratic South Africa that the applicants are currently living in to the apartheid, human-rights violating regime that they had left behind.<sup>251</sup> Reflective of the broader significance of the case to the rest of the population is the fact that the Court's insistence that South Africa should be a deliberative, and not merely participatory democracy, gave rise to expectations, and set a legal precedent that this would indeed reflect the new state of affairs in the country.<sup>252</sup>

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<sup>246</sup> Michael Ignatieff, 'Human Rights', in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999).

<sup>247</sup> International Convention on the Suppression and Punishment of the Crime of *Apartheid*, UN General Assembly Resolution 3068 (XXVIII), entered into force July 18, 1976.

<sup>248</sup> Padraig McAuliffe, 'Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?', *Hague Journal on the Rule of Law*, 2 (2010), 110.

<sup>249</sup> Ruti G. Teitel, *Transitional Justice* (Oxford: OUP, 2000) at 220.

<sup>250</sup> *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT 12/05) [2006] ZACC 11.

<sup>251</sup> *Ibid.*, at [112].

<sup>252</sup> *Matatiele Municipality and Others v. President of the Republic of South Africa and Others (2)* (CCT 73/05A) [2006] ZACC 12.

Finally, it has been argued that human rights promote justice by ensuring that past injustices will not be repeated again in the future. Courts can in theory achieve this by punishing past human rights violations, which in turn deters such future behaviour.<sup>253</sup> However, the effectiveness of trials to set an example has been questioned, with opponents persuasively arguing that there is no empirical evidence or sound theory in support of expectations of deterrence.<sup>254</sup> Perhaps a more realistic way in which human rights can prevent future injustices is through the broad powers usually given to Constitutional Courts in post-conflict countries to invalidate legislation and hold governments to account when enacted laws are contrary to human rights standards.<sup>255</sup> Both the Bosnian and the South African Constitutional Courts have used these powers and referred to the past injustices and the need to prevent their repetition in the future. For example, Judge Van Der Westuizen justified his insistence on the importance of the right to vote by making extensive reference to South Africa's 'shameful apartheid past'.<sup>256</sup> Similarly, in its decision to amend the Constitution of the Republika Srpska, the BiH Constitutional Court referred to past discriminatory practices on numerous occasions.<sup>257</sup> A final example from the Cypriot context can be used to illustrate the contribution of human rights protection both in remedying past injustices and preventing future ones from occurring: it was the right to property that empowered Greek Cypriot (GC) displaced people to express their sense of injustice for being forcefully evicted from their homes and demand in an internationally understood and legitimate language both that they are remedied for these violations and that a future peace agreement should prevent them from continuing or being repeated again in the future.

However, while the justice-promoting properties of human rights cannot be ignored, it is also important to acknowledge that their protection might also have the reverse effect. Whether an action is perceived as just or not depends on a range of contextual

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<sup>253</sup> Diane F. Orentlicher, 'Setting Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, 100 (1991), 2537.

<sup>254</sup> Erik G. Jensen, 'Justice and the Rule of Law', in Charles T. Call (ed.), *Building States to Build Peace* (Boulder London: Lynne Rienner Publishers, 2008) at 127; Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy', *Journal of Law and Society*, 39(3) (2012), 410 at 424.

<sup>255</sup> Bell, *Peace Agreements and Human Rights* at 150.

<sup>256</sup> *Doctors for Life International v. Speaker of the National Assembly and Others*, Dissenting Judgment of Van Der Westuizen J at [5].

<sup>257</sup> *U-5/98 (3<sup>rd</sup> Partial Opinion)* (1 July 2000, BiH CC) at [84], [90], [95] and [129] (references to 'past *de jure* discrimination' in the Republika Srpska).

factors, which can rarely be accurately reflected through the black and white dichotomies of the human rights language.<sup>258</sup> Since human rights are morally loaded concepts, perpetrators of violations are always presented as villains and diametrically opposed to them are the disempowered victims.<sup>259</sup> Yet, this picture rarely reflects the complex justice terrain of a post-conflict society. It ignores that someone can be both a victim and a perpetrator of human rights violations and that there are those who committed violations, yet in the eyes of the people, acted justly. A classic example of such an ambivalent figure is Winnie Mandela who suffered greatly as a victim in the hands of the apartheid regime, but was also responsible for human rights violations herself; violations, which some members of the black community consider justified. Moreover, Borer persuasively argues that it might be appropriate for the purposes of justice to create different categories of perpetrators depending on the culpability of their actions (direct, indirect, institutional and passive perpetrators), yet none of these subtleties can be expressed through human rights language.<sup>260</sup> However, this inability of human rights to accurately label the protagonists of the conflict suggests that they will be unable to promote, and might even undermine, feelings of justice among the population.

A similar limitation of human rights exists in relation to victims. Prosecutions of human rights violations tend to only deal with an arbitrarily narrow segment of injustices caused during the war, either because these are deemed more important than others or due to evidentiary reasons. However, decisions to only deal with specific types of violations often mean that those who suffered by unjust policies in other ways are not formally considered victims. This changes the way different types of harms caused by the war are portrayed, and as a result, people's perception of how the previous regime acted unjustly. For example, the fact that the Truth and Reconciliation Commission in South Africa (SA) did not deal with discriminatory practices in all areas of life, but only limited itself to specific violent crimes, made such injustices less condemnable and those who committed them less likely to

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<sup>258</sup> Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa', *Human Rights Quarterly*, 25 (2003), 1088.

<sup>259</sup> Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', *Social and Legal Studies*, 22 (2013) 489; David Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal*, 15 (2002), 101.

<sup>260</sup> Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa'.

apologise for their actions. Thus, promoting justice exclusively through the protection of human rights can make victims feel doubly victimised since they are likely to feel that the injustices they have suffered have not been recognised or remedied. This inability of human rights to accurately describe a person's experiences during the conflict, does not only undermine justice, but can also have similar effects on reconciliation, something that is examined in more detail in the next section.

Perhaps more fundamentally, it should be acknowledged that in addition to human rights inadvertently undermining justice, their limitation might also be explicitly required by it. This is doubly complicated by the fact that often what justice requires in the first place is in itself ambiguous and uncertain. Take for example the controversy surrounding property rights in Cyprus. GC argue that since they were forcefully displaced from their homes and are still prevented from returning to them, the passage of time should not undermine the strength of their property titles. If they wish to, they should have a right to return, irrespective of who has been living in their property and for how long.<sup>261</sup> They point to European Court of Human Rights (ECtHR) cases following *Loizidou v. Turkey*, which confirm that their forced displacement and continuation of the practice are violations of the right to property.<sup>262</sup> Turkish Cypriots (TC) on the other hand, argue that forcing them to abandon the (GC) houses they have been occupying since 1974, when some of them have lived their whole lives there, would be an injustice in itself. While the forced displacements of the past were wrong, attempts to undo these injustices should not create new ones and, as a result, GC should be content with compensation of their lost properties. Supporting their claims are ECtHR statements that 'with the passage of time the holding of a title may be emptied of any practical consequences'.<sup>263</sup> Thus, if post-conflict justice requires that injustices of the past are remedied and future ones are prevented, GC are concerned with the first part of the definition and TC with the second. Ultimately, what is just is often not clear in the first place. However, irrespective of which approach is preferred in the end, either Greek or Turkish Cypriots' rights will have to be limited in the name of justice.

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<sup>261</sup> *Demopoulos v. Turkey* (2010) 50 E.H.R.R. SE14 at [67].

<sup>262</sup> *Loizidou v. Turkey* (Preliminary Objections) (1995) 20 E.H.R.R. 99; *Loizidou v. Turkey* (Merits) (1997) 23 E.H.R.R. 513.

<sup>263</sup> *Demopoulos v. Turkey* at [111].



This example also points to the fact that even in situations where human rights can contribute to justice, they can be effective in this regard only under certain conditions, the most important of which is that a peace agreement concerning the future of the ethnically divided, post-conflict society has already been reached. One should not expect human rights to give ‘the right answer’ as to what justice in a given context demands because a number of proposals might be compatible with it. The expectation that human rights will somehow be able to replace political willingness to negotiate by pointing to the right answers and leaving nationalist leaders with a *fait accompli* they cannot escape, grossly overestimates their peacebuilding and justice-promoting potential. This is particularly so in relation to international human rights, which are limited by the margin of appreciation, especially in atypical contexts, such as those of ethnically divided societies. As McEvoy and Rebouche rightly put it in the context of legally-induced change more generally, ‘[t]he organised legal profession is likely to follow or at least move alongside rather than lead a process of change.’<sup>264</sup> Thus, frequent demands from officials that the proposed solution to the Cypriot problem should be compatible with human rights and respect people’s status as European citizens, cannot meaningfully contribute to peace since a series of human rights-compatible proposals that would be acceptable to one side’s sense of justice but unacceptable to the other’s, would satisfy this requirement.<sup>265</sup>

Finally, and much like security, it should also be recognised that ‘matters of justice can be highly important in our lives without being matters of human rights’;<sup>266</sup> as a result, the protection of human rights is in itself not enough to promote justice and other policies will also have to be adopted. This observation is particularly relevant in cases of economic rights and social justice. Especially where the conflict has been a long one, it is possible that social injustices will have arisen between different groups: the apartheid policies in SA have created huge differences in terms of wealth between blacks and whites, while the international embargo and isolation of the areas not

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<sup>264</sup> Kieran McEvoy and Rachel Rebouche, ‘Mobilizing the Professions: Lawyers, Politics, and the Collective Legal Conscience’, in John Morison, Kieran McEvoy and Gordon Anthony (eds.), *Judges, Transition, and Human Rights* (Oxford: OUP, 2007) at 313.

<sup>265</sup> A peace agreement that respects and is compatible with human rights is a popular Greek Cypriot demand. See for instance, the speech of the President of the Republic at the UN General Assembly on 26 September 2013, available at <http://www.moi.gov.cy/moi/pio/pio.nsf/All/0B91CDE6DE7004CBC2257BF200523EAB?OpenDocument> [accessed 7 June 2014].

<sup>266</sup> James Griffin, *On Human Rights* (Oxford: OUP, 2008) at 198.

under the control of the Republic of Cyprus (henceforth, Republic or ROC), has left GC generally more well-off than TC. In both cases justice dictates that such injustices are remedied and measures are taken to prevent their continuation and repetition. However, it is unclear whether such a plea for justice can be expressed in human rights terms. Even if blacks in SA and TC in Cyprus are considerably poorer than whites and GC respectively, it does not follow that their human rights are being violated.<sup>267</sup> In their majority they still have shelter, food and work, thus suggesting that the situation might be unjust and in need of state attention, but not in itself a violation of economic rights.<sup>268</sup> Ultimately therefore, justice makes broader demands than human rights and a failure to acknowledge this increases the risk of ‘confusing rights with equality or legal recognition with emancipation.’<sup>269</sup>

Even in cases where the socio-economic condition of a particular applicant is so grave that it can amount to a human rights violation, this is only likely to promote justice to a limited extent. On the one hand, labelling this situation as a violation of human rights can in theory promote justice because it sends the message that the victim deserves a better standard of living and that action from the government is a matter of entitlement rather than charity. On the other hand however, economic rights are rarely implemented and they tend to make very little headway in terms of promoting justice in practice. The obligation of the International Covenant on Economic Social and Cultural Rights on each member state ‘to *take steps* [...] to the *maximum of its available resources*, with a view to achieving *progressively* the full realization’ of the rights therein often makes its provisions practically meaningless.<sup>270</sup> Moreover, even though the South African Constitution makes socio-economic rights justiciable, these have not made a huge difference to the lives of the people.<sup>271</sup> Their adjudication has led to some notable successes, but in general the judiciary has granted the government

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<sup>267</sup> Brad R. Roth, 'Marxian Insights for the Human Rights Project', in Susan Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge: CUP, 2008).

<sup>268</sup> Oskar N. Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?', *Human Rights Quarterly*, 29 (2007), 674.

<sup>269</sup> Wendy Brown, 'Rights and Identity in Late Modernity: Revisiting the ‘Jewish Question’', in Austin Sarat and Thomas R. Kearns (eds.), *Identities, Politics and Rights* (Ann Arbor: University of Michigan Press, 1995) at 129.

<sup>270</sup> ICESCR, Article 2(1), (my emphasis).

<sup>271</sup> Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited', *Human Rights Quarterly*, 29 (2007), 796.

a wide deference in these issues.<sup>272</sup> In turn, despite its rhetoric, the SA government has failed to take firm action to deal with the social injustices created by the apartheid regime.<sup>273</sup>

The fact that justice makes broad demands that sometimes fall outside the ambit of human rights can have profound consequences for peacebuilding. Even if an injustice could be loosely expressed as a human rights violation, it does not necessarily follow that remedying that violation will also undo the injustice. Take for example the forced displacement of people, an injustice that also tends to be expressed as a violation of the right to property. While a big part of it has to do with the loss of one's property, as the right correctly identifies, forced displacement is such a great injustice because it also has to do with the loss of a community and security for the future. Problematically, neither of these additional injustices can be described through human rights language. Peacebuilders tend to assume that forced displacement is merely a legal problem of property titles being in the wrong hands, an injustice that can simply be unlegislated.<sup>274</sup> As a result, they often protect the right to property, thus address the legal part of the injustice, and expect that no further action is needed to deal with the socio-economic or psychological consequences of forced displacement. This failure to understand that often human rights protection is only *part* of the process of undoing injustices offers an explanation for many of the failures of peacebuilding operations around the world. It is because of an overestimation of the justice-promoting potential of human rights that while restitution and compensation programmes are almost always present in peacebuilders' agendas, the equally important steps of apologising for the forced displacement or offering post-restitution support are often absent.

Peacebuilders have worked on the assumption that 'the sustained protection of rights is essential for dealing with conflict constructively' because it avoids 'structural

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<sup>272</sup> *Minister of Health v. Treatment Action Campaign* (CCT 9/02) [2002] ZACC 16.

<sup>273</sup> The 2011 census showed that incomes for black households increased on average 169% over 10 years, but their annual earnings are still approximately a sixth of those of whites. (Mike Cohen, 'South Africa's Racial Income Inequality Persists, Census Shows', *Bloomberg*, 30 October 2012 on <http://www.bloomberg.com/news/2012-10-30/south-africa-s-racial-income-inequality-persists-census-shows.html> [accessed 7 June 2013].

<sup>274</sup> Theunis Roux, 'Land Restitution and Reconciliation in South Africa', in Francois Du Bois and Antje Du Bois-Pedain (eds.), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge: CUP, 2008).

injustices and inequalities'.<sup>275</sup> Nevertheless, the analysis in this section suggests that this is only a one-dimensional account of the relationship between justice and human rights. In addition to the positive connection that Parlevliet alludes to, justice could require that human rights are restricted, or it might inadvertently have this effect. In any case, if human rights are to promote justice, certain conditions must be satisfied: there must, for example, exist an agreement between the groups as to the structure of the post-conflict society they want to create. Finally, it is often the case that justice makes broader demands than human rights. There might be injustices, such as socio-economic inequalities, that do not amount to human rights violations in the first place, or situations where an injustice can only be partially expressed in human rights terms. Even justice therefore, the one element of peace that is most closely associated to human rights, cannot be completely achieved through their protection.

#### **4. The relationship between human rights and reconciliation**

Reconciliation requires the forging of positive relationships between members of different ethnic groups, both on the personal and the political level. In order for such relationships to develop in post-conflict societies where members of the 'other' ethnic group have usually been dehumanised, it is necessary that perceptions about people's identity are challenged and eventually some sort of trust is established between them. It is this process leading to the promotion of the final element of peace, that the Brahimi Report argues, can be aided through human rights protection. The report does not explain how exactly the protection of human rights will result in better-reconciled individuals and communities. It merely declares that 'the human rights component of a peace operation is indeed critical to effective peace-building. United Nations human rights personnel can play a leading role, for example, in helping to implement a comprehensive programme for national reconciliation.'<sup>276</sup> However, this expectation is only rarely confirmed through practical examples. In fact, most reconciliation-promoting measures are not connected to human rights at all, and in some cases, there

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<sup>275</sup> Parlevliet, 'Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management' at 12.

<sup>276</sup> Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations', (New York: United Nations, 2000) at [41]. For a similar comment, see also [24] of this report.

might even be a negative relationship between the protection of the one and the promotion of the other.

To the extent that human rights can promote security and justice, they can also indirectly contribute to reconciliation. It is after all, impossible to start (re)building positive relationships between groups if their members feel that they are under physical threat, that injustices are still taking place or that they are likely to be repeated. However, this relationship is only an incidental one since it is possible that human rights protection can promote security or justice at the same time as undermining reconciliation. An example of this is the prosecution of war criminals, which can contribute to a sense of security among the population and feelings of justice among the victims, but can undermine reconciliation, especially if all the defendants are members of the same ethnic group. Alternatively, it has been argued that ideas that are popularly associated with human rights, such as dignity and respect of the person, could promote reconciliation.<sup>277</sup> Nevertheless, having rejected any necessary connection between human rights and foundational principles in favour of Raz's political approach, this argument also becomes unpersuasive. A final way in which human rights can promote reconciliation is by challenging dominant narratives that present one group's identity as diametrically opposed to the other's. By highlighting the concerns that members of various ethnic groups have in common, human rights reject ideas of unavoidably conflicting interests between them. An example of this is the foundation of the Northern Ireland's Women Coalition, the members of which, Protestant and Catholic alike, worked towards the protection of women's rights. However, any contributions this made to reconciliation have not been the results of *legally* protected human rights and thus, fall outside the ambit of this analysis.

The more one thinks about the positive contributions of human rights to reconciliation, the harder it becomes to find examples of them. In fact, it is more likely that legally protected human rights relate in negative, rather than positive ways to reconciliation. The law, with its black and white language and, in the context of post-conflict societies, sometimes artificially clear distinctions between perpetrators

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<sup>277</sup> Bertrand Ramcharan, 'Human Rights and Human Security', *Disarmament Forum*, 3 (2004), 39 at 45.

and victims, is unlikely to accurately reflect people's perceptions of reality. Furthermore, the determination of certain individuals as guilty perpetrators and others as the diametrically opposed innocent victims creates clear winners and losers. Importantly, these determinations are not just about the guilt or innocence of a specific individual, but are often perceived as determinations about their group as a whole. These characteristics and effects of human rights however, are likely to polarise members of the two sides and undermine reconciliation. Take for example, the GC cases to the ECtHR against Turkey.<sup>278</sup> the GC understood the ECtHR decisions that Turkey was violating their human rights as a 'win' for their side and confirmation of their long-held belief that the only perpetrators in the conflict were the 'others'. Moreover, since the applicants – and by extension, all GC – were the confirmed victims, this must mean that there were no TC victims in the conflict. On the other hand, the TC understood Turkey's 'loss' at the ECtHR as another indication of the GC's intention to isolate and punish them. With these polarised points of view and ample help from politicians ready to misinterpret the Court's decisions in a way that confirmed each side's dominant narrative, the cases seriously undermined rather than promoted any reconciliation attempts between the two communities.

While this example suggests that internationally protected human rights entail clear dangers, their domestic protection could also have detrimental consequences for reconciliation. There is a mistaken assumption among peacebuilders that the judiciary is always progressive and independent, which has resulted in a tendency to view domestic courts separately from the larger institutional context in which they operate.<sup>279</sup> Yet, this assumption is particularly problematic in relation to issues that have to do with ethnic identities, which deeply affect people's perceptions of what is right, whether they have had legal training or not. The starkest example of this is the *Constituent People's case*, described by the BiH Constitutional Court as 'the case of all cases',<sup>280</sup> in which all domestic judges voted (and used human rights language in order to support their decision) in line with their ethnic groups' interests. Characteristic of this is the allegation of one of the dissenting judges that the

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<sup>278</sup> See in particular *Loizidou v. Turkey* (Preliminary Objections); *Loizidou v. Turkey* (Merits).

<sup>279</sup> Erik G. Jensen, 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses', in Erik G. Jensen and Thomas C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003).

<sup>280</sup> *U-98/5 (3<sup>rd</sup> Partial Opinion)*, Dissenting judgement by Judge Mirko Zovko.

(Bosniac) applicant had stated in a daily newspaper: ‘We need five votes for the Decision, three foreign Judges will probably vote for us, which means that in the worst case we will have five votes.’<sup>281</sup> ‘Us’ in this case being the Bosniacs, with a clear indication that he took his ethnic group’s judges’ decision for granted. However, if the judiciary is perceived as ethnically biased, this can be a major setback for reconciliation attempts in the country.

This example illustrates a further way in which human rights can undermine reconciliation attempts: judges can use them in order to justify intolerant or nationalist practices with which they personally agree. This was avoided in the Bosnian case due to the presence of the international judges in the Constitutional Court, but the danger materialised when *Ibrahim Aziz v. Ministry of the Interior* was heard in Cyprus.<sup>282</sup> In that case the Supreme Court – exclusively composed of GC members – unanimously held that preventing TC from voting in all Republic elections since 1963 because of their ethnic group was neither a violation of the right to vote nor of freedom from discrimination. Case law that seems to favour one ethnic group over the other is generally a problem for reconciliation, a fact confirmed by Gibson and Gouws’ statistical evidence from SA, which suggests that an intolerant judgment by the Constitutional Court increases intolerant public attitudes in relation to the same issue from 58.3% to 75%.<sup>283</sup> It is however particularly problematic when human rights language is used to support such judgments because it provides them with additional legitimacy and further undermines reconciliation attempts. Merely assuming that human rights are beneficial for peace because they empower judges, who always get it right, grossly overestimates the reconciliation-promoting potential of both judges and human rights.

In addition to human rights protections undermining reconciliation attempts, the opposite is also true: the language of reconciliation can be used in such a way so as to prevent robust human rights protections. This danger, identified by McEvoy in his analysis of the Northern Ireland conflict, arises when the powerful group in the society argues that the ethnic conflict exists because of a lack of reconciliation rather

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<sup>281</sup> Ibid., cited by Judge Mirko Zovko.

<sup>282</sup> *Ibrahim Aziz v. Ministry of the Interior* (Case No. 369/2001) (23/05/2001, ROC Supreme Court).

<sup>283</sup> James L. Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (Cambridge: CUP, 2003) at 173.

than due to human rights abuses.<sup>284</sup> Attempts by the weaker party to label the problem as one of human rights violations are often dismissed as being too divisive. This tendency does not only exist in Northern Ireland, but is arguably a characteristic of ethnically divided, post-conflict societies more generally. An example where this danger has materialised is Bosnia and Herzegovina where shortly after the end of the war, the leaderships of all three ethnic groups committed to allow refugees to return to their homes and made vague political promises to this effect. This general talk of sustainable return (which was equated with reconciliation<sup>285</sup>) appeased and stopped the international community from demanding more robust strategies for the remedying of displaced people for half a decade, thus seriously undermining feelings of security and justice in the country.<sup>286</sup> McEvoy's warning should act as a reminder therefore, that reconciliatory language, especially where it crowds out more robust rights talk (and action), can often be abused and undermine, rather than promote, peacebuilding attempts in the country.

Nonetheless, perhaps the most important observation about the relationship between reconciliation and human rights is that the two are often unconnected. As Philpott put it, '[t]hough reconciliation encompasses core commitments of the liberal tradition, such as human rights, it is a far more holistic concept'.<sup>287</sup> Since reconciliation requires changing perceptions about our and the other's identity, among the most effective ways of promoting it is through projects that have a direct impact on our lives. Yet, such projects are often not connected to human rights at all. For instance, 'Reimagine Coexistence', a reconciliation-promoting project in BiH, brought together members of different ethnic groups that participated in a number of activities, such as joining a basketball team and running a café. Similarly, the United Nations Development Programme (UNDP) in Cyprus is tasked with supporting the ongoing peace and reconciliation process. As part of its mandate, it has encouraged Greek and Turkish Cypriots from a previously mixed village to build a library/museum together and has

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<sup>284</sup> Lesley McEvoy, Kieran McEvoy and Kirsten McConnachie, 'Reconciliation as a Dirty Word: Conflict, Community Relations and Education in Northern Ireland', *Journal of International Affairs* 60(1) (2006), 81.

<sup>285</sup> Leopold Von Carlowitz, 'Resolution of Property Disputes in Bosnia and Kosovo: The Contribution to Peacebuilding' *International Peacekeeping* 12(4) (2005), 547 at 558.

<sup>286</sup> The change in strategies came in 1999 with the adoption of the Property Law Implementation Plan. For more information, see the discussion in Chapters 6 and 7.

<sup>287</sup> Daniel Philpott, 'An Ethic of Political Reconciliation', *Ethics and International Affairs*, 23/4 (2009), 389 at 390.



fostered partnerships between the two Chambers of Commerce on the island.<sup>288</sup> Additional measures that could be taken in ethnically divided societies to promote reconciliation include preventing inflammatory propaganda in public media, adopting a common educational syllabus and a common version of history and encouraging people to learn the other's language. None of these projects directly relates to human rights, thus suggesting that important as they may be for other elements of peace, they remain largely unconnected to the most effective reconciliation-promoting methods.

Moreover, human rights often fail to influence reconciliation attempts because of the type of change they tend to induce. Reconciliation does not require the abandonment of ethnic identities, but it does involve the re-evaluation of some deeply held beliefs about the 'other'; it is, in other words, all about changing people's attitudes and beliefs. In this sense, the reconciliation-promoting contribution of human rights is potentially limited since they are generally concerned with changing policies, processes and institutions rather than the perceptions of the people.<sup>289</sup> Illustrative of this is the implementation of *Aziz v. Cyprus*, the ECtHR case which resulted in an amendment of the Cypriot electoral law and empowered TC permanently living in the areas controlled by the Republic to vote.<sup>290</sup> However, while the new law protected the right to vote, it was not accompanied by any public discussion about the desirability of such an amendment or its broader implications. Moreover, there were no debates about why TC had been disenfranchised in the first place and how this affected the relationship between the two communities. Thus, if the legal change had any positive impact on inter-ethnic relations, this was surely just an incidental one. Similarly, the South African *Doctors for Life International* line of cases, which is discussed in more detail in the following chapters, shows how the protection of the right to democratic participation may compel politicians to follow different practices (in this case consulting the people before reaching a decision), but it cannot force them to change

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<sup>288</sup> Projects of UNDP Cyprus, available at <http://www.cy.undp.org/content/cyprus/en/home/operations/projects/overview.html> [accessed 30 May 2014].

<sup>289</sup> For the contrary view, emphasising the power of international law to change perceptions, see Robert Sloane, 'The Expressive Capacity of International Punishment', *Stanford Journal of International Law*, 43 (2007), 39.

<sup>290</sup> *Aziz v. Cyprus* (2005) 41 E.H.R.R. 11.

their beliefs and actually take into account what was expressed during the consultation process.<sup>291</sup>

This is not to argue that changing a State's formal practices cannot eventually influence the politicians' and public's opinions and promote reconciliation. In fact, Gibson and Gouws provide evidence that a decision by the South African Constitutional Court to allow an unpopular party to protest is likely to increase levels of 'grudging tolerance' in the population.<sup>292</sup> However, it is unclear what the long-term impact of such a decision is on the people and whether tolerant attitudes usually take root or are ephemeral, especially when these judicial decisions are not accompanied by reconciliation-promoting measures on the ground. Moreover, if a change in institutions is followed by a change in attitudes, this is only a pleasant side effect, rather than an unavoidable consequence of human rights: human rights protection has achieved its objectives when institutions and official practices have been changed, irrespective of whether reconciliation requires a lot more than that in order to be achieved. Furthermore, relatively few issues that have to do with inter-ethnic reconciliation can be put in legal language and be heard by the courts, and it is rare that judicial decisions are published broadly enough to become known to the public. Thus, the contribution of judicially protecting human rights is often indirect and sporadic and cannot be the only reconciliation-promoting measure relied on by the state.

Finally, in order for the reconciliation-promoting potential of human rights to fully materialise, the specific context in which they are being implemented must be taken into account. Illustrative of this is the creation of the Committee for Missing Persons in Cyprus. Missing persons strike a special chord in the psyche of both Cypriot communities and uncertainty about their whereabouts and the human rights violations that this has created undermine reconciliation attempts on the island. The Committee for Missing Persons, made up from Greek and Turkish Cypriot experts, has uncovered the remains of a number of these people and has been described as 'a model of

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<sup>291</sup> *Doctors for Life International v. Speaker of the National Assembly and Others; Matatiele Municipality and Others v. President of the Republic of South Africa and Others* (2).

<sup>292</sup> Gibson and Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* at 171. They argue that the Court could boost tolerance from 27.7% to 56.8%, an increase of 29.1%.

successful cooperation between the Greek Cypriot and Turkish Cypriot communities'.<sup>293</sup> Nevertheless, its effects on reconciliation remain limited since its achievements are rarely acknowledged and discussed in public. The protection of the right to life and freedom from torture that the Committee seeks to achieve is therefore only the first step; it is also necessary that the people on the ground – the subjects of reconciliation attempts – are made aware of its practices and internalise its conclusions.

Equally important for reconciliation is the requirement that human rights are protected by a body that the public considers legitimate. If this condition is not satisfied, its judgments will not be able to contribute to feelings of reconciliation among the people. The clearest example of a failed judicial attempt to promote reconciliation is the ICTY which suffers from a lack of legitimacy in almost all countries in the Former Yugoslavia, but particularly in Serbia and the Republika Srpska in BiH.<sup>294</sup> Surveys in the region suggest that only a tiny percentage of people trust the ICTY (7.6% in Serbia and 3.6% in the Republika) and that the majority of Serbs consider it biased against them.<sup>295</sup> This profound hostility towards the Tribunal is coupled with a lack of knowledge among the people about the institution: there is the misconception that it unfairly and overwhelmingly indicts Serbs and the majority of the Serb population consider it 'the greatest danger to national security'.<sup>296</sup> A sizable number of people polled (19%) believe that Serbia should not cooperate with the ICTY no matter the cost, while only 15% believe that it is important to do so for reasons of justice and reconciliation.<sup>297</sup> The majority believes that Serbia should cooperate only if this will result in the avoidance of sanctions or the granting of international financial aid.

With these statistics in mind, even if the ICTY rulings were well-known (which they are not) and even if prosecuting war criminals generally promotes reconciliation

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<sup>293</sup> Committee of Missing Persons in Cyprus brochure, <http://www.undp.org/content/dam/cyprus/docs/PFF%20Publications/UNDP-CY-CMPleaseaflet.pdf>, [accessed 30 May 2014].

<sup>294</sup> Patrice McMahon and David Forsythe, 'The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics', *Human Rights Quarterly*, 30 (2008), 412.

<sup>295</sup> Mikro Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', *Journal of International Criminal Justice*, 7 (2009), 89 at 91-92.

<sup>296</sup> *Ibid.*, at 89.

<sup>297</sup> *Ibid.*, at 93.

(which has been contested), the impact of the Tribunal on reconciliation is at best non-existent and at worst, a negative one. Thus, what reconciliation needs in addition to the legal protection of human rights is a coordinated campaign that speaks to the people: it challenges the national media's and politicians' accusations about the Court being biased, explains why its work and human rights protection are important and dismisses some of the most important myths about the events of the war (such as that only one side committed atrocities). Moreover, a criminal court might have fared better in terms of reconciliation if it was a domestic rather than an international one, since the allegation that it was imposed on the people by biased outsiders would be more difficult to support. For instance, while the two are not easily comparable and despite the problems that have been identified with the domestically created Truth and Reconciliation Commission, its findings have been accepted by South Africans to a much greater extent than the findings of the ICTY in the Balkans.<sup>298</sup>

It therefore transpires that despite the confident declaration in the Brahimi Report about the reconciliation-promoting potential of human rights, reconciliation is in fact the one element of peace that is connected to them in mostly negative, rather than positive ways. In particular, human rights, with their tendency to create clear winners and losers and the possibility that they can be used by judges to justify their personal beliefs, are more likely to further polarise different ethnic groups. Like with the other two elements however, most of the time, human rights and reconciliation are simply not connected at all. The most effective method of promoting reconciliation is to challenge perceptions, not change laws and institutions, a task that human rights can contribute very little to. In any case, even in those cases where human rights can indirectly contribute to reconciliation, their effectiveness will depend on whether the institution giving effect to them is considered legitimate and is well known to the population at large.

## **5. Assessing the use of human rights as part of the liberal peacebuilding strategy**

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<sup>298</sup> Jay A. Vora and Erica Vora, 'The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner and English South Africans', *Journal of Black Studies*, 34/3 (2004), 301.

The strategy that is currently used in different ethnically divided, post-conflict societies around the world – liberal peacebuilding – is based on certain assumptions and displays a number of characteristics. It essentially presupposes that if the post-conflict state engages in liberal practices, this will more-or-less automatically also result in the development of liberal values among the population. Consequently, peacebuilders perceive the establishment of liberal laws and institutions as the success they were working towards, and halt their efforts before they actually see and assess the effects of these institutions in practice. Moreover, the liberal peacebuilding recipe always consists, irrespective of the society's history and context, of the two same ingredients: democratic and free market institutions. Both ingredients depend on the protection of human rights, since democracy cannot function without the right to vote and free markets without the right to property. In fact, so closely associated has been the protection of human rights with the promotion of peace through the liberal recipe that the two have sometimes been perceived as ultimately being one and the same thing.<sup>299</sup> Nevertheless, the current assessment suggests that none of these assumptions are well-grounded, thus pointing to the need to re-examine the liberal peacebuilding model as a whole and the central role that human rights have played in it.

Among the most important conclusions reached from the analysis so far is that there is nothing to indicate that the protection of human rights will certainly and unavoidably lead to a peaceful society; to the contrary, while there are positive connections between the two, it is also possible that human rights might compromise efforts to promote security, justice and reconciliation or might leave them completely unaffected. This is primarily because all three elements, but especially reconciliation, are broader than human rights. The term 'broader' relates to two different but related characteristics: first, each of the elements can be promoted through different methods,

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<sup>299</sup> The suggestion that the two concepts are identical has been made by scholars who talk of the 'human right to peace'. (See, for example, Jim Ife, 'Human Rights and Peace', in Charles Webel and Johan Galtung (eds.), *The Handbook of Peace and Conflict Studies* (London and New York: Routledge, 2007); Abdul Aziz Said and Charles O. Lerche, 'Peace as a Human Right: Toward an Integrated Understanding', in Mertus Julie and Jeffrey W. Helsing (eds.), *Human Rights and Conflict: Exploring the Links between Rights, Law and Peacebuilding* (Washington DC: United States Institute of Peace Press, 2006).) This view has also been endorsed by United Nations General Assembly Resolution (UNGAR) 39/11 *Declaration of the Right of Peoples to Peace* (12 November 1984). Nevertheless, arguments that human rights and peace are one and the same thing are largely unjustified and remain unpersuasive, especially in relation to *legal* human rights. For a reply to the 'right to peace' literature, see Jack Donnelly, 'Peace as a Human Right – Commentary', in J. Mertus and Jeffrey W. Helsing (eds.), *Human Rights and Conflict: Exploring the Links between Rights, Law and Peacebuilding* (Washington DC: United States Institute of Peace Press, 2006).

some of which might be connected to human rights, and others which adopt a different approach altogether. Second, those methods that are connected to human rights contribute to peace in valuable, but specific and limited ways. In particular, they can result in institutional changes and amendments to the law, but they cannot directly induce the necessary socio-economic and psychological changes for peace. Positive, negative or simply no connections between human rights and the three elements, coupled with the fact that the demands of security, justice and reconciliation often contradict between themselves, suggest that the relationship between the two concepts is in fact more complicated than peacebuilders have so far assumed.

Arguably therefore, the centrality of human rights as part of the liberal peacebuilding strategy has been misplaced. Far from their protection always leading to democratic and free market institutions and then straight on to peace, they must in fact be supplemented by other peacebuilding mechanisms as well. Such mechanisms can either be instituted from the top down or from the grassroots up, but their focus should be the people of the ethnically divided society itself rather than its institutions. Examples of such top-down peacebuilding measures could include subsidies or loans to previously disempowered groups within the population or the establishment of a Truth and Reconciliation Commission that could help dispel myths about the conflict. Alternatively, victim support groups or grassroots development projects, which have a practical impact on the life of the community, could contribute to peacebuilding from the bottom-up. Such people-centred peacebuilding practices should co-exist alongside human rights protections since they can in fact make them more effective in their peacebuilding task. Where resources are restrained however, as they often are in post-conflict societies, it would be wise to consider in each case whether peacebuilding objectives would be more effectively promoted through human rights protections or any of these other alternative methods. If peacebuilders conclude in favour of the former, it should be because of a careful consideration rather than a vague expectation that human rights will do good.

Finally, the analysis suggests that instead of uniformly applying the same peacebuilding strategy in different countries around the world, peacebuilders should appreciate that the way and extent to which human rights can promote peace is in fact context-specific. Their effectiveness as peacebuilding tools ultimately relies on the

presence of certain conditions on the ground that peacebuilders should seek to promote rather than take for granted. For instance, irrespective of how diligently human rights are protected, they are only likely to make meaningful contributions to security when some security has already been established on the ground through other ways. What these ways are and the extent to which they can in fact lead to greater security depends on the context of the society in question. Similarly, protecting human rights is unlikely to promote feelings of justice and reconciliation if the institutions tasked with their protection are considered illegitimate or detached from the population they are addressing. Again, whether such conditions are present in different divided societies depends on the history of the institutions and the way they have been perceived by opinion-shapers. If they are not present however, peacebuilders should either work towards them or adjust their expectations about what human rights can achieve in their absence.

## **6. Conclusion**

This chapter, read together with Chapters 2 and 3, concludes the theoretical part of the thesis and lays out a framework of the relationship between peace and human rights that is both sobering and at the same time promising for future peacebuilding operations. It is sobering because it challenges the peacebuilding presumption that if a post-conflict society resembles a liberal state closely enough because of its institutions and human rights protections, it will somehow also start acting as one. It outright acknowledges that there are important steps that must be taken in the peacebuilding process, which are nevertheless, unrelated to institutional changes and human rights protections. Both the ambit of human rights and the changes they can result in are limited and specific, which suggests that they have to be supplemented by other peacebuilding tools and methods as well. Moreover, this framework clarifies that even in those situations in which human rights *can* help build peace, if this is to be done effectively, a number of conditions must be present. The most important among these conditions is that there is a political willingness to promote each of the elements of peace; human rights are at their most effective when they operate alongside such political willingness, rather than when they are trying to compensate for its absence.

At the same time however, the framework is promising for the future of peacebuilding operations to come. It argues that peace in ethnically divided, post-conflict societies is something achievable and confirms that human rights can contribute in specific and practical ways so that it can in fact be achieved. The conflict between the elements and the fact that human rights can promote some but not others, suggests that difficult decisions will have to be made as to whether they should be protected or not. However, deciding between difficult dilemmas has always been in the job description of peacebuilders: among such dilemmas, are decisions about opting for prosecutions or amnesties and whether the international community should allow the war to continue in the hope of a more just peace agreement later on. Nevertheless, being aware of the different relationships between the elements and human rights allows such difficult dilemmas to be carefully thought out and for arguments to be made for each side, rather than be determined through intuition and unjustified assumptions. Finally, this analysis makes the peacebuilders' task more difficult by asking that they turn their attention, in addition to the drafting and implementation of human rights, to the conditions that will make them effective. While this demands more from peacebuilders than the current practice, it is also likely to be more fruitful in ensuring that the peacebuilding potential of human rights will be utilised to the greatest possible extent.



## **PART 2: The practical relationship between human rights and peace**

### **Interlude: The road travelled so far and the remaining path to follow**

Part 1, the theoretical part of the thesis, argued that there is a need to adopt a more nuanced understanding of the relationship between peace and human rights. Both concepts were deemed to be unclear – the first because so little has been said about it and the second because of how much. Thus, peace was defined as existing when a balance is struck between the sometimes reinforcing and other times contradictory elements of security, justice and reconciliation. Security is concerned with an absence of fear among the population, justice with the remedying and non-repetition of past atrocities and reconciliation with the (re)building of positive relations between the ethnic groups. Human rights on the other hand, have been defined as fundamental interests that are entrenched and legally protected on the domestic and international levels. They can promote security, justice and reconciliation in different ways and to various extents depending on the context of the ethnically divided, post-conflict society itself and the conditions that exist there. Thus, a better understanding of the two key concepts suggests that in addition to the expected positive relationship between human rights and peace, the two might not be connected at all or the former might even have negative consequences for the latter. This directly challenges the international community's assumption that the existence of liberal institutions, key among them being those safeguarding human rights, necessarily results in the creation of a peaceful society.

This conclusion is confirmed and its importance highlighted in Part 2, the practical part of the thesis, which examines the relationship between two human rights – the right to vote and the right to property – and peace in Bosnia and Herzegovina, South Africa and Cyprus. The premise of the practical section is that a society can balance security, justice and reconciliation concerns by successfully managing the conflicts that are keeping it divided. The more successfully these conflicts are dealt with, the more effective peacebuilding operations become. Thus, the question posed in Part 2 concerns the extent to which human rights have aided this conflict management

process and consequently helped build peace in practice. The next two chapters (Chapters 5 and 6) provide insights to this question by focusing on the adjudication and implementation of human rights respectively; they argue that in addition to the well-established strengths of human rights, one must also recognise the limitations that undermine their peacebuilding potential. The last of the three practical chapters (Chapter 7) looks at what lies beneath the conflict and points to the fact that, even when perfectly protected, human rights can only induce legal and institutional amendments. Since the management of conflicts and the building of peace require that political, socio-economic and psychological changes also take place, human rights are at best only one of the peacebuilding tools that should be used in ethnically divided, post-conflict societies.

## **Chapter 5: Conflict management through human rights adjudication**

### **1. Introduction**

The expectation that human rights can help build peace has been reiterated time and time again in the last 20 years. Illustrative of this is the Brahimi Report's unambiguous statement that 'the human rights component of a peace operation is indeed critical to effective peace-building'.<sup>300</sup> This belief has been especially manifested in relation to the protection of the right to vote and the right to property: much ink has been spilled, by academics and practitioners alike, about the peacebuilding qualities of democratic systems, at the centre of which lies the right to vote.<sup>301</sup> Similarly, the need to remedy victims of forced displacement by protecting their right to property has also attracted considerable attention.<sup>302</sup> This faith in the peacebuilding potential of human rights also seems to be shared by individual applicants who have turned to Courts and asked that they contribute to the management of the political conflicts that divide their countries. For these reasons it becomes important to examine in more detail what has been the relationship between human rights adjudication and conflict management in practice.<sup>303</sup> have the Courts always been able to deliver the expected positive results and, if not, should human rights be supplemented or even replaced by other peacebuilding tools?

The conflict transformation and peacebuilding potential of human rights in practice will be examined by focusing on three case studies: Cyprus, Bosnia and Herzegovina (BiH) and South Africa (SA). The three case studies vary between themselves

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<sup>300</sup> See for example, Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations', (New York: United Nations, 2000) at [41].

<sup>301</sup> Ian O'Flynn, 'Democratic Theory and Practice in Deeply Divided Societies', *Representation*, 46/3 (2010), 281.

<sup>302</sup> Anneke Smit, *The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution* (London: Routledge, 2012).

<sup>303</sup> Adjudication is not the only way of using human rights. They also have a role to play in parliamentary debates, in the decision-making process of the executive or in the deliberation of any ad hoc commissions that might be set up to deal with a particular issue. It is however, the most important: without it, these bodies are less likely to act respectfully of human rights because they know that their decisions will not be challenged in Court. (For this argument in the context of the English human rights protection system, see Colm O'Cinneide, 'Democracy and Rights: New Directions in the Human Rights Era', *Current Legal Problems*, 57 (2004), 175.)

because they tend to be divided by different types of conflicts. On the one hand, the lack of a peace agreement in Cyprus means that there is no (or at least not yet, a) common framework on which the parties can rely and build, in order to gradually manage their differences. The conflicts in the country remain zero-sum, with the ethnic groups refusing to compromise their respective positions, which in turn, makes them seemingly impossible to manage. Conversely, while conflicts still exist in SA, they are less divisive and easier to manage than the Cypriot ones. The most difficult questions about what the post-apartheid state would look like were answered during the negotiations leading up to the Interim and Final Constitutions and any lingering disagreements have been concerned with the more practical issue of what is the best interpretation of these legal documents.<sup>304</sup> Finally, the Bosnian case study rests somewhere between the Cypriot and the South African ones: the Dayton Agreement that ended the war has answered some of the dilemmas that were dividing the three ethnic groups, but other zero-sum disagreements, not dissimilar to those found in Cyprus, still remain.<sup>305</sup>

This chapter makes the argument that the contribution of human rights to conflict management and the building of peace varies depending on how zero-sum and divisive is the conflict in the first place. Courts – rightly – tend to avoid getting involved in the most fundamental disagreements between the parties and are more comfortable making pronouncements in relation to less divisive conflicts, such as the ones that are present in SA and to a lesser extent in BiH. Section 2 explains why conflict management is necessary in order to successfully balance the competing elements of peace. Sections 3, 4 and 5 elaborate on and illustrate with practical examples the contributions – positive or negative – that the rights to property and vote have made to specific disagreements in each of the three case studies. Finally, Section 6 draws on the practical implications of this analysis and suggests tools and strategies that could supplement or replace human rights when their adjudication fails to have the expected peacebuilding effects.

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<sup>304</sup> Constitution of the Republic of South Africa Act [No. 200 of 1993]; Constitution of the Republic of South Africa [No. 108 of 1996] (henceforth, SA Constitution).

<sup>305</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995.

## **2. Political conflicts and peace in ethnically divided, post-conflict societies**

A war is the result of divisive political conflicts that remain ignored or not managed in the appropriate way; frustrated and worried about the protection of their interests and their ethnic group's survival (concerns that tend to be exacerbated by nationalist propaganda), individuals often resort to violence.<sup>306</sup> Looking at the process in reverse, peace requires, as a first step, the successful management of these political conflicts.<sup>307</sup> Importantly, by 'successful management' I do not mean their permanent resolution or elimination since such objectives are neither possible nor desirable in ethnically divided, post-conflict societies.<sup>308</sup> Political conflicts result from different views about the best course of action on a given question and are therefore, a necessary part of life in healthy democratic states, which accept and encourage divergence of opinion. What is problematic is not the existence of political conflicts *per se*, but the fact that they sometimes remain unaddressed and can, as a result, become violent. While their elimination – a phrase that necessarily portrays conflicts as negative phenomena – demands that political disagreements are no longer expressed, their successful management requires that they are debated, negotiated and different points of view are incorporated in the final solution. As with all compromises, the solution is unlikely to be the ideal outcome for all parties, but it might nevertheless be acceptable to them for the sake of the common good.

Such compromise solutions are particularly difficult to achieve in the early stages of the peacebuilding operation because during that period the disagreements dividing the society tend to be characterised by the fixed and irreconcilable views of the parties. These views can result in zero-sum conflicts, the existence of which makes balancing the three elements of peace look like a seemingly impossible endeavour. In the worst case scenarios, difficulties in managing irreconcilable conflicts can lead to the status

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<sup>306</sup> William Zartman, 'Dynamics and Constraints in Negotiations in Internal Conflicts', in William Zartman (ed.), *Elusive Peace: Negotiating an End to Civil Wars* (Washington DC: Brookings Institution, 1995); John Burton, *Conflict: Resolution and Prevention* (London: Macmillan, 1990).

<sup>307</sup> This echoes some of Galtung's work, discussed in Chapter 2, Section 3. While his definition of positive and negative peace was ultimately rejected as unworkable, some of his original assumptions (like the need to successfully manage, or in his words 'transform' conflicts) are of great value. See in particular, Johan Galtung, 'Introduction: Peace by Peaceful Conflict Transformation – the TRANSCEND Approach', in Charles Webel and Johan Galtung (eds.), *The Handbook of Peace and Conflict Studies* (London and New York: Routledge, 2007).

<sup>308</sup> Peter Harris and Ben Reilly, 'Democracy and Deep-Rooted Conflict: Options for Negotiators', (Stockholm: International Institute for Democracy and Electoral Assistance, 1998) at 17-18.

quo – unsatisfactory as it may be – being the preferred solution by everyone. Problematically however, the longer a conflict remains without a solution, the more fixed the views of the parties become and the hurdles of the conflict management process increase. The way out of this vicious cycle is for the parties to transform zero-sum conflicts into simpler disagreements and work towards managing those instead. Since peace is a continuing balance between security, justice and reconciliation, solutions to such political conflicts are not set in stone: rather, their successful management requires that they are revisited if the context or the interests of the parties change.

An example of an unmanaged, zero-sum conflict concerns the types of remedies that should be provided to those Cypriots who were displaced in the 1960s and 1970s. This dilemma between the remedy of restitution and the remedy of compensation has been manifested as a clash between the Greek Cypriots' (GC) wish to promote justice and the Turkish Cypriots' (TC) concern to ensure security. On the one hand, the majority of GC believe that a peace agreement should allow them to buy property and reside anywhere they want in Cyprus; any restrictions to their freedom of movement would be unjust and simply perpetuate the divisions that exist on the island. On the other, TC contend that the only way to protect their identity is for them to remain a majority within their own constituent state, something which due to their small numbers, would require that GC are permanently prevented from residing there.

If peace is to be achieved, conflicts such as this must be transformed into a series of less divisive and more manageable disagreements. This transformation requires both sides to take a leap of faith and abandon demands for the absolute protection of their – irreconcilable – interests, thus pointing to the importance of charismatic, popular and peace-friendly political leaders. Taking the Cypriot property example again, the parties should compromise their all-or-nothing positions and agree that, at least in the early stages after the peace agreement, only certain categories of GC will be allowed to reside and buy property in the TC constituent state. (With the passage of time and increased levels of security among the TC, the restrictions on GC's freedom to reside in the place of their choice should ideally be gradually lifted.) The question would then be a matter of assessing the evidence and determining whether specific individuals from the GC community fall in these categories or not; this might result in

additional smaller disagreements, but they are likely to be a lot more manageable than the original irreconcilable conflict. To put it in peace terms, such disagreements might still be disruptive to the affairs of the state, but the balance between security and justice considerations would become easier to strike. Thus, the more successfully a conflict is managed, the easier it becomes to balance the three elements of peace; in turn, the effectiveness of human rights as peacebuilding tools is ultimately determined by the extent to which they can contribute to this conflict management process.

Peacebuilding practices have, at least partly, relied on the expectation that adjudication of human rights, and in particular of the rights to vote and property, can lead to successful conflict management and ultimately to peace. For example, statements have been made that the right to vote is ‘the backbone of the democratic system itself’<sup>309</sup> and that ‘democracy contributes to preserving peace and security’.<sup>310</sup> Similarly, the protection of the right to property has received attention from the UN,<sup>311</sup> the United Nations High Commissioner for Refugees (UNHCR),<sup>312</sup> the World Bank,<sup>313</sup> the Norwegian Ministry of Foreign Affairs<sup>314</sup> and academics.<sup>315</sup> This is because in addition to being able to contribute to the alleviation of economic difficulties that tend to arise after a war, the right has been considered as instrumental to the remedying of displaced people, one of the most emotive and difficult to resolve issues of the conflict. Nevertheless, while an examination of the conflicts in the three case studies sometimes confirms these expectations, it disproves them on other occasions. In particular, it appears that the more zero-sum the nature of the conflict, the less likely it is that human rights adjudication can contribute to its management.

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<sup>309</sup> Jean-Paul Costa, 'The Links between Democracy and Human Rights under the Case-Law of the European Court of Human Rights', (Helsinki, 5 June 2008).

<sup>310</sup> UN Secretary-General, 'An Agenda for Democratization', (New York: United Nations, 1996) at [16]. This idea is also repeated at [21] and [118] of the same report. Moreover, the relationship between democracy and peace has been the subject of extensive empirical research. For an excellent literature review, see Steve Chan, 'In Search for Democratic Peace: Problems and Promise', *Mershon International Studies Review*, 41 (1997), 59.

<sup>311</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons', (Geneva: United Nations, 11 August 2005).

<sup>312</sup> UNHCR, 'The State of the World's Refugees: A Humanitarian Agenda', (Oxford: OUP, 1997).

<sup>313</sup> Paul Collier and et al., *Breaking the Conflict Trap: Civil War and Development Policy* (Washington: World Bank and OUP, 2003).

<sup>314</sup> Ministry of Foreign Affairs, 'Peacebuilding – A Development Perspective', (Oslo: Government of Norway, 2004).

<sup>315</sup> Scott Leckie and Chris Huggins, *Conflict and Housing, Land and Property Rights: A Handbook on Issues, Frameworks, and Solutions* (Cambridge: CUP, 2011); Smit, *The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution*.

### **3. Adjudicating political conflicts in Cyprus**

Of the three case studies, conflicts in Cyprus remain the most divisive, something reflected in the fact that peace negotiations remain stagnant more than 40 years after the last serious occurrence of violence. The parties' positions have over the years been so irreconcilable that questions have been raised as to whether the conflict is an unsolvable one with partition being the only alternative.<sup>316</sup> Thus, the question that arises is: to what extent can the protection of the rights to vote and property contribute to the difficult task of forging some common ground between the fixed positions of the parties? An analysis of the disagreements between the two Cypriot communities suggests that human rights adjudication has made very limited contributions to conflict management in the country and has arguably even resulted in negative consequences for the outcome of the negotiations.

The conflict between the two ethnic groups on the island is really a disagreement as to the purpose of a united Cyprus: who should the state be seeking to protect? The individual Cypriot citizen or the ethnic group to which she is a member? GC contend that they want a Cyprus where ethnicity plays as little role as possible, while TC argue the opposite. One specific manifestation of this conflict concerns disagreements about the allocation of political power between the two ethnic groups. GC favour a strong federal government with limited powers to the Constituent states, universal protection of individual rights and as little protections of minority rights as possible. Moreover, they argue that it is unfair for TC, a community of 18% to elect 30 or 40% of the legislature and to have the veto power in important decisions. Conversely, TC maintain that the 1960 Constitution recognised their community, despite its smaller size, as politically equal to the GC one. The only way to safeguard its distinctness and equality is for most political power in a future Constitution to rest with the constituent states and any federal decisions to be subject to the veto power.

Another manifestation of this zero-sum conflict concerns the way in which the people that were displaced during the 1963-1964 inter-community strife and the 1974

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<sup>316</sup> International Crisis Group, 'Divided Cyprus: Coming to Terms on an Imperfect Reality', (Nicosia/Instabul/Brussels: International Crisis Group, 2014).



Turkish invasion will be remedied. There are currently approximately 165,000 displaced Greek and 45,000 displaced Turkish Cypriots on the island, but each community has in mind very different solutions to this problem.<sup>317</sup> On the one hand, GC consider the Turkish invasion of the island to be the root of the displacement problem. Their preferred remedy is restitution since that will take them back to the pre-1974 situation as much as possible. On the other, TC see the events of 1974 not as an illegal invasion, but as a necessary intervention for the protection of their endangered ethnic identity from the GC majority. They consider the current state of affairs, with the two populations largely segregated, as the best alternative; they argue that GC should recognise the facts on the ground and accept that the only realistic remedies to the displacement problem are compensation and exchange of properties.<sup>318</sup> These different remedies envisioned by the two communities are not the result of different interpretations of the law; rather they stem from different visions of what a united and peaceful Cyprus should look like, thus explaining the unwillingness of the two sides to compromise their positions.

The failure of the negotiators to agree on and successfully manage these conflicts directly undermines peace on the island: while there has been no serious violence in Cyprus since the 1974 Turkish invasion, there are still thousands of Turkish troops stationed there and Turkey has since then, been (successfully) threatening the Republic of Cyprus (ROC) with the use of military force in order to influence its decisions on a range of issues of national importance.<sup>319</sup> In addition to undermining security, the ongoing, unsuccessful negotiations keep reminding Cypriots on both sides of the Green Line that the injustices of the 1960s and 1970s continue until today and that a solution will be a compromise where their preferred form of justice will not

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<sup>317</sup> Global IDP Database, 'Profile of Internal Displacement: Cyprus', (Geneva: Norwegian Refugee Council/ Global IDP Project, 2003) at 6 citing estimates of the UN Peacekeeping Forces in Cyprus. It is estimated that displaced persons constitute about 23% of the Cypriot population.

<sup>318</sup> Ayla Gürel and Kudret Özersay, 'The Politics of Property in Cyprus: Conflicting Appeals to 'Bizonality' and 'Human Rights' by the Two Cypriot Communities', (Nicosia: International Peace Research Institute Oslo, 2006).

<sup>319</sup> The UN Secretary-General has described 'the northern part of the island [as] one of the most highly militarized areas in the world in terms of the ratio between numbers of troops and civilian population'. (UN Secretary-General, 'Report of the UN S-G to the SC on the UN Operation in Cyprus', (7 June 1994) at [28].) As an example of Turkish interference with Cypriot national security issues, see the current threats that if Cyprus continues with natural gas exploitation, 'Turkey will absolutely retaliate'. (Statement by the Turkish Deputy Prime Minister, cited in Ayla Gürel, Fiona Mullen and Harry Tzimitras, 'The Cyprus Hydrocarbons Issue: Context, Positions and Future Scenarios', (Nicosia: Peace Research Institute Oslo, December 2012) at 62.)

be fully protected. Finally, the current status quo also undermines reconciliation since each side portrays the other as making maximalist demands and as being solely to blame for the lack of a peace agreement. The unsuccessful management of these conflicts also has indirect negative consequences for peace: it has created conditions for nationalist rhetoric to flourish, demonised the idea of inter-ethnic cooperation and contributed to electoral disillusionment, none of which helps promote feelings of security, justice or reconciliation.

Nevertheless, while the successful management of these conflicts is necessary for building peace in Cyprus, human rights adjudication has not really contributed to it. On the one hand, the judiciary has generally been unwilling to hear and decide cases that are concerned with such zero-sum conflicts and on the other, even in cases where it has become involved, its contribution has been far from positive. Ultimately, the conflicts in Cyprus are best dealt with, not through human rights adjudication, but through political negotiations and it is on these that peacebuilders should be turning their attention and resources. In a different context and while explaining its reluctance to get involved in the management of a divisive political conflict, the South African Constitutional Court made exactly this distinction between legal and political processes. In particular, it pointed out that '[t]his Court is not and cannot be a site for political struggle. It can do nothing to resolve differences within that process. We are a site for the vindication of rights'.<sup>320</sup>

The first limitation of human rights in relation to conflict management in Cyprus, namely the judiciary's unwillingness to use them, is illustrated through case law on the right to vote. The right is protected by Article 31 of the ROC Constitution, and Article 3 of Protocol No. 1 (Article 3-1) of the European Convention on Human Rights (ECHR). Two Cypriot right to vote cases have reached the European Court of Human Rights (ECtHR) to date: *Aziz v. Cyprus*<sup>321</sup> and its follow-up case, *Erel and Damdelen v. Cyprus*.<sup>322</sup> In order to understand the claims of the parties in the two cases, some background into the complex development of the Cypriot electoral provisions is necessary. The 1960 ROC Constitution provided for executive and

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<sup>320</sup> *Merafong Demarcation Forum v. President of the Republic of South Africa* (CCT 41/07) [2008] ZACC 10 at [306].

<sup>321</sup> *Aziz v. Cyprus* (2005) 41 E.H.R.R. 11.

<sup>322</sup> *Erel and Damdelen v. Cyprus* (App. No. 39973/07) (30 April 2007).

legislative elections through two electoral registers – one for GC and one for TC. The GC would vote for 70% of the legislature and the President, while the TC would decide on the composition of 30% of the legislature and the Vice-President.<sup>323</sup> When the TC withdrew from government in 1963, all their positions remained vacant, thus making the Republic's operation according to the Constitution, impossible. In response to this situation, the Supreme Court decided that the doctrine of necessity could be used to interpret the Constitution in such a way so as to allow for the State's continued existence.<sup>324</sup> As a result, the Republic has, since then, been operating with decision-making bodies consisting only of GC (who are, according to the Constitution, only elected through the GC electoral register). This, coupled with the continuing requirement that all TC voters should be registered in their own electoral catalogues, wholly prevented TC from exercising their right to vote.

Over the years, the GC electoral register came to include those foreigners who had become naturalised, but not TC. Mr. Aziz challenged this situation arguing that since the Republic has for all intents and purposes a single electoral register, TC permanently residing in ROC-controlled areas should be included in it as well. The Cypriot Supreme Court rejected the suggestion finding that what limited the TC from voting was not the law, but the TC community's unilateral decision to abandon their positions in the Republic.<sup>325</sup> The case reached the ECtHR where this argument was, unsurprisingly, dismissed: the 40-year disenfranchisement of TC permanently living in the ROC-controlled areas was a violation of Articles 3-1 and 14 of the Convention.<sup>326</sup> The Court's judgment was swiftly implemented: the applicants and other TC in a similar position are now included in the Republic's single electoral register, they are allowed to vote in all elections and be voted in all elections except the Presidential one.<sup>327</sup> Encouraged by the applicants' success in *Aziz*, a group of

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<sup>323</sup> Constitution of the Republic of Cyprus, signed on 16 August 1960 (henceforth, ROC Constitution), Article 1 (for the executive) and Article 72 (for the legislature).

<sup>324</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others* (1964) CLR 195 (CA) (ROC Supreme Court).

<sup>325</sup> *Ibrahim Aziz v. Ministry of the Interior* (Case No. 369/2001) (23/05/2001, ROC Supreme Court).

<sup>326</sup> *Aziz v. Cyprus* at [38]. Note that the case dealt only with TC permanently living in the areas controlled by the Republic, rather than TC generally.

<sup>327</sup> Ο περί Άσκησης του Δικαιώματος του Εκλέγειν και Εκλέγεσθαι από Μέλη της Τουρκικής Κοινότητας που Έχουν Συνήθη Διαμονή σε Ελεύθερο Έδαφος της Δημοκρατίας (Προσωρινές Διατάξεις) Νόμος του 2006 (2(I)/2006) [The Law Concerning the Right to Vote and be Elected of the Members of the Turkish Community that Permanently Reside in the Unoccupied Areas of the Republic, Law of 2006 (2(I)/2006)].

Turkish Cypriots challenged the electoral law again, arguing that Article 3-1 required not only that they are allowed to vote in the ROC, but also that they are entitled to a separate electoral register through which they could vote for 30% of the legislature and the Vice-President.<sup>328</sup> The Court, referring to Cyprus' wide margin of appreciation, declared this follow-up case as inadmissible.

The ECtHR adopted a radically different approach in the two cases: the challenge in *Aziz* was not only found to be admissible but also successful, while that in *Erel* was swiftly dismissed as manifestly ill-founded. An explanation of this is that while the two cases seemingly dealt with a same issue, the demands of the applicants were much more at odds with the position of the ROC in *Erel* than in *Aziz*. The challenge of the state's structures in *Erel* was based on the belief that Cypriots should not vote as individual citizens, but rather as members of ethnic groups (hence the need for separate electoral registers). This fundamentally contrasted with the GC understanding of the purpose of the state, thus giving rise to a zero-sum, difficult-to-manage conflict. Conversely, the applicants in *Aziz* were in agreement with the ROC that individuals should enjoy voting rights because of their status as citizens rather than because of their ethnic group membership. They were merely asking that their ethnic background did not cloud this agreement and affect the rights they should enjoy. The Court's willingness to intervene in *Aziz* but not in *Erel*, even though the issue could be expressed in human rights terms in both cases, suggests that human rights can contribute to the management of some conflicts but not others. In particular, it seems that the conflicts that are least likely to be successfully managed through human rights adjudication are those that divide the post-conflict society the most.

Several reasons can explain the right's failure to manage the conflict in question. The applicants in *Erel* essentially asked an international Court to compel the ROC to fundamentally change its democratic structures: increase the number of MPs, re-introduce the position of the Vice-President and create another electoral register. However, a country's democratic structures are deeply affected by a 'wealth of differences, *inter alia*, in historical development, cultural diversity and political

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<sup>328</sup> *Erel and Damdelen v. Cyprus*.

thought’.<sup>329</sup> It is not the place of an international court to set uniform standards on this issue, something acknowledged by the ECtHR in *Erel* when it referred to each State’s ‘considerable latitude in establishing constitutional rules’.<sup>330</sup> Ultimately, the management of such divisive political conflicts requires considerably more intervention than an international court can legitimately engage in. Nevertheless, even a domestic court is likely to have exercised similar judicial restraint. The issue in *Erel* goes to the heart of a state’s relationship with its citizens and it is a question that should be publicly debated and decided by democratically elected and accountable politicians, not judges. In any case, the judiciary – domestic or international – can only interpret human rights within a given matrix; it can protect an individual’s interests in a specific context, not build a society from scratch, which is what the successful management of these zero-sum conflicts aims to achieve. These reasons suggest that the Court’s decision in *Erel* is not a one-off; attempts to manage the most divisive political disagreements in the country by judicially protecting the right to vote will generally fail.

The unwillingness of the ECtHR to get involved in conflicts relating to the right to property in Cyprus is less apparent than in the right to vote cases, but still there. The right is protected under Article 23 and Section 36 of the ROC and ‘Turkish Republic of Northern Cyprus’ (‘TRNC’) Constitutions respectively and also safeguarded by Article 1 of Protocol No. 1 (Article 1-1) of the European Convention. The first right to property case concerning the Cypriot conflict to reach the ECtHR was *Loizidou v. Turkey*, where the Court found a violation of the applicant’s Article 1-1.<sup>331</sup> The applicant owned property in the occupied part of Cyprus and argued that the presence of Turkish troops and the fact that they prevented her from crossing the Green Line violated her right to freely use and enjoy it. The majority of the Court agreed, finding that Turkey was in effective control of the northern part of Cyprus, and therefore responsible for any violations that were taking place there.<sup>332</sup> Conversely, the minority in *Loizidou* had expressed serious reservations about whether the ECtHR should get involved in the adjudication of such a zero-sum conflict. Judge Jambreg for example, pointed out that ‘Courts are adjudicating in individual and in concrete

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<sup>329</sup> *Hirst v. United Kingdom (No. 2)* (2006) 42 E.H.R.R. 41 at [61].

<sup>330</sup> *Erel and Damdelen v. Cyprus*.

<sup>331</sup> *Loizidou v. Turkey* (Merits) (1997) 23 E.H.R.R. 513.

<sup>332</sup> *Ibid.*, at [64].

cases according to prescribed legal standards. They are ill-equipped to deal with large-scale and complex issues which as a rule call for normative action and legal reform.<sup>333</sup> Echoing these concerns, Judge Pettiti referred to ‘the whole problem of the two communities [which...] has more to do with politics and diplomacy than with European judicial scrutiny’.<sup>334</sup>

Confirming the minority’s concerns, over the years approximately 1400 cases with similar facts flooded the European Court, which kept reaffirming the majority’s decision in *Loizidou*.<sup>335</sup> This state of affairs, with the Court almost mechanically finding a violation of Article 1-1, changed in *Demopoulos v. Turkey*, a case with identical facts to *Loizidou*.<sup>336</sup> In *Demopoulos*, Turkey accepted responsibility for the violation of property rights of GC for the first time and sought to offer a remedy by establishing the Immovable Property Commission (IPC). The Court examined the IPC’s power to offer restitution, compensation or exchange of properties to the applicants and declared that it provided effective legal remedies, which barred further legal action from GC applicants to the ECtHR. The current situation is that applicants seeking a remedy for the violation of their property rights, must apply to the IPC and only after exhausting all legal remedies in the ‘TRNC’ can they apply to the ECtHR. Thus, *Demopoulos* brings the Cyprus cases in line with other decisions of the ECtHR on the right to property, in which the Court has generally avoided to adjudicate such zero-sum conflicts.<sup>337</sup>

The right to property cases also point to the second limitation of human rights in terms of conflict management, namely that even in situations in which the judiciary has become involved, its contribution has not always been positive. In fact, despite the ECtHR’s assessment that Cyprus’ problem ‘should have been resolved by all parties assuming full responsibility for finding a solution on a political level’, its case law on the right to property has actually hindered the successful outcome of the

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<sup>333</sup> Ibid., Dissenting Opinion by Judge Jambreg at [7].

<sup>334</sup> Ibid., Dissenting Opinion by Judge Pettiti.

<sup>335</sup> Nicos Skoutaris, ‘Building Transitional Justice Mechanisms without a Peace Settlement: A Critical Appraisal of Recent Case Law of the Strasbourg Court on the Cyprus Issue’, *European Law Review*, 35/5 (2010), 720 at 725.

<sup>336</sup> *Demopoulos v. Turkey* (2010) 50 E.H.R.R. SE14.

<sup>337</sup> Tom Allen and Benedict Douglas, ‘Closing the Door on Restitution: The European Court of Human Rights’, in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge: CUP, 2011).

negotiations.<sup>338</sup> One of the major hurdles to a solution is the disagreement of the two sides as to what the right to property requires: GC favour restitution and generally believe that compensation is not an adequate remedy at all, while TC contend that that should suffice. The ECtHR's case law has destabilised the negotiations by hardening the respective positions of the parties since they have selectively read it as only confirming their point of view. For instance, after *Loizidou* had been decided in the applicant's favour, GC assumed that the ECtHR had confirmed their long-standing position that all displaced persons should return to their homes and that nothing short of restitution of *all* properties could satisfy the European Court's standards. The Court had insisted that it 'does not consider it necessary, let alone desirable [...] to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC"',<sup>339</sup> yet, GC have understood *Loizidou* to mean that the property issue is a matter of rectifying an illegal situation, a task that could only be achieved through full compliance with international law. This has in turn resulted in an unwillingness among the majority of GC to approve of a solution that does not allow restitution in all cases.<sup>340</sup>

On the other hand, the *Demopoulos* line of cases has also created very few incentives for TC to resolve the conflict. In *Xenides-Arestis v. Turkey*, a case that preceded *Demopoulos* and held for the first time that the IPC could in principle be an effective domestic remedy, the Court pointed out that the possibility of restitution should exist for the applicants.<sup>341</sup> Nevertheless, it was subsequently stated in *Demopoulos* that it is within the discretion of each state what remedy it will provide since 'property is a material commodity which can be valued and compensated for in monetary terms.'<sup>342</sup> As a result of *Demopoulos*, almost all the cases that have been decided by the IPC so far have been settled through compensation.<sup>343</sup> However, if the IPC provides the opportunity to the 'TRNC' to resolve the overwhelming majority of claims through *its* preferred remedy, this removes any incentive from the TC side to negotiate an

<sup>338</sup> *Demopoulos v. Turkey* at [85].

<sup>339</sup> *Loizidou v. Turkey* (Merits) at [45].

<sup>340</sup> Alexandros Lordos and Erol Kaymak, 'Public Opinion and the Property Issue: Quantitative Findings', (Cyprus: Interpeace, 2010) at 7.

<sup>341</sup> *Xenides-Arestis v. Turkey* (2007) 44 E.H.R.R. SE13.

<sup>342</sup> *Demopoulos v. Turkey* at [115].

<sup>343</sup> Presidency of Immovable Property Commission, 'Monthly Bulletin, May 2014', (Nicosia: Immovable Property Commission, 30 May 2014), on [http://www.tamk.gov.ct.tr/dokuman/istatistik\\_subat14ing.pdf](http://www.tamk.gov.ct.tr/dokuman/istatistik_subat14ing.pdf) [accessed 7 June 2014].

agreement, which is likely to require the return of considerable areas of land back to the GC.

At best, the ECtHR's decisions in relation to the property conflict in Cyprus point to the obvious conclusion: that a compromise is necessary and that the solution lies neither with all victims receiving restitution of their properties, nor with all of them simply being compensated for their loss. At worst, the Court's confirmation of the obvious has been achieved to the detriment of reconciliation on the island. A selective reading of the case law allows each side to perceive the other as making maximalist demands that are contrary to what it perceives human rights and justice to require. This, in turn, makes Cypriots less confident that they can coexist in a united Cyprus. 'If we cannot settle on this self-evident issue, whose answer is clearly provided in international law' each side reasons, 'how can we hope to live together and reach joint decisions in the future?' Courts are therefore rightly reluctant to get involved in the management of the most divisive, zero-sum conflicts in a society not only because they have little authority to decide what is the 'right answer' in each case, but also because when they do, they risk undermining the willingness to compromise both among the negotiators and the public at large. As a result, such conflicts should arguably be managed through peacebuilding strategies other than human rights adjudication; examples of these are discussed in more detail in the final section of this chapter.

#### **4. Adjudicating political conflicts in Bosnia and Herzegovina**

The Bosnian peace process has also been mared by the existence of unmanaged conflicts in the country. Contrary to Cyprus however, where the parties are still debating the purpose of the new state and the structure of how its institutions, these questions have been answered in BiH, at least to some extent. In theory, the common ground that was reached by the three ethnic groups in Dayton should have allowed them, in the twenty years that followed, to successfully manage the remaining of their conflicts and through that process reach a balance between the competing elements of peace. This has somewhat taken place over the years, with a range of political



conflicts, such as those concerning the appropriate use of the veto power by ethnic group representatives, having been successfully managed.<sup>344</sup>

Nevertheless, the Dayton Agreement has to a large extent proven to be unworkable and ethnically divisive,<sup>345</sup> consequently, and especially in the early years after the war, conflicts were managed through decrees from the Office of the High Representative rather than political negotiations and compromises from the country's elected representatives.<sup>346</sup> As a result, several political conflicts have lingered and festered, thus paralysing the country and undermining the peace process: the extensive use of the veto power and a complete unwillingness for political cooperation among the ethnic group representatives has turned law-making into an almost impossible endeavour. Among the most recent, but by no means unique, illustrations of this was the inability of the elected representatives to agree on changes to the Law on Personal Identification Number, which concerns the ID number given to every citizen after birth.<sup>347</sup> This stopped the issuing of new passports to newborns and resulted in the tragic death of a baby that needed, but could not obtain, medical assistance abroad.<sup>348</sup> Peaceful protests to stir Parliament into action fell on deaf ears and soon afterwards a number of BiH's main cities witnessed violent uprisings, arguably leaving the country in its most volatile state since the 1990s.<sup>349</sup> The detrimental effect of unmanaged conflicts in the country, has led the Deputy High-Representative to publicly describe BiH, almost 20 years after the end of the war, not as a post-conflict country, but as a pre-conflict one.<sup>350</sup> Questions of whether protecting human rights, and in particular the right to vote, can contribute to the better management of conflicts and the building of peace in BiH are therefore pressing.

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<sup>344</sup> BiH has also been divided by political conflicts concerning forced displacement and the allocation of economic power between the ethnic groups. While the right to property has majorly affected the management of these conflicts, it has become relevant through the international community's 'Property Law Implementation Plan' rather than adjudication and will be dealt with in Chapters 6 and 7.

<sup>345</sup> International Crisis Group, 'Bosnia's Future' (Sarajevo/Brussels: International Crisis Group, 2014).

<sup>346</sup> Richard Caplan, 'Who Guards the Guardians? International Accountability in Bosnia', in David Chandler (ed.), *Peace without Politics? Ten Years of International State Building in Bosnia* (London and New York: Routledge Taylor & Francis Group, 2006).

<sup>347</sup> Law on Personal Identification Number (*Official Gazette of Bosnia and Herzegovina* nos. 32/01 and 63/08).

<sup>348</sup> For additional contextual information, see Elvira M. Jukic, 'Bosnia Ends Crisis over Personal Number Law', *Balkan Insight*, 6 November 2013.

<sup>349</sup> Jasmin Mujanovic, 'It's Spring at Last in Bosnia and Herzegovina', *Aljazeera*, 11 February 2014.

<sup>350</sup> Speech by Mr. Christopher Bennett, the Deputy High Representative, at the launch of Lord David Owen's book *Bosnia and Herzegovina: Ways Forward* (London School of Economics, 11 June 2013).

The BiH Constitution does not specifically include a right to vote provision, but declares in Article II.2 that the ECHR and its Protocols ‘shall apply directly in Bosnia and Herzegovina.’ As a result of that, several conflicts in the country have already been managed through the adjudication of the right to vote. Among the most noteworthy contributions of the right was made in relation to a disagreement about the proper use of the veto power in the law making procedure. According to the Bosnian Constitution, a ‘proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat and Serb people’, a declaration which empowers the majority of the relevant ethnic caucus to veto the law in question.<sup>351</sup> The far-reaching consequences of this provision have raised questions as to when it is appropriate for an ethnic caucus to make such a declaration and what is meant by the term ‘vital interest’ in the first place. The BiH Constitutional Court has contributed to the management of this conflict by finding that the meaning of the term is not completely subjective.<sup>352</sup> While the Court did not explicitly refer to the right to vote when reaching its decision, it placed significant emphasis on the final objective of the right, namely the promotion of democracy. It thus reasoned that:

‘the meaning of “vital interests” is partly shaped by Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, i.e. “that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society” (line 3 of the Preamble). To this end, the interest of the constituent peoples in fully participating in the system of government and the operation of public authorities can be seen as a vital interest.’<sup>353</sup>

The Court went on however, to argue that a democratic state is also a functional one; consequently, the efficient participation of the constituent peoples in the decision making procedures through the use of the veto power should never take place at the expense of the effective operation of the state. The vital interest cases provide evidence that the right to vote has, on occasions, played an important, albeit indirect,

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<sup>351</sup> Constitution of Bosnia and Herzegovina, Annex 4 of the General Framework Agreement signed on 14 December 1995 (henceforth, BiH Constitution), Article IV.3.e. The veto power can also be exercised by each of the three members of the Presidency under Article V.2.d of the BiH Constitution.

<sup>352</sup> *U-8/04* (25 June 2004, BiH CC); *U-10/05* (22 July 2005, BiH CC).

<sup>353</sup> *U-10/05*, para.24.

role in conflict management in the country. Had these disagreements remained unaddressed, they would have further paralysed the Bosnian state and undermined peacebuilding attempts in the process.

Another, perhaps the most, divisive conflict in the country concerns the question of whether Bosnian citizens who are not members of the three constituent people – in other words, those who do not identify as Bosniacs, Serbs or Croats – should be allowed to run for office. This question has been adjudicated in the seminal ECtHR case of *Sejdić and Finci v. BiH*, in which the applicants challenged the Bosnian Constitution itself as violating the right to vote.<sup>354</sup> A detailed analysis of this case suggests that while the ECtHR used the right to vote in an attempt to adjudicate and manage the conflict in question, this was by no means an easy or uncontroversial decision. In order to understand the claims of the parties and significance of the case, some knowledge of the complex BiH Constitution is necessary. The Constitution establishes a federal government and two entities – the Federation of BiH and the Republika Srpska – and divides all political power equally between the three Constituent Peoples. The House of Peoples (the upper chamber of the Legislative Assembly) consists of 5 Serbs from the Republika and 5 Croats and 5 Bosniacs from the Federation, while two-thirds of the members of the House of Representatives (the lower chamber) are from the Federation and a third from the Republika.<sup>355</sup> Similarly, the Presidency is made up of 3 members, one from each constituent people, with the proviso that the Serb representative comes from the Republika and the Croat and Bosniac ones from the Federation.<sup>356</sup>

Necessary as this protection of the ethnic groups was deemed to be for the ending of the war, it has resulted in two major problems in relation to the right to vote. First, it purposively excludes the citizens of BiH who are not members of one of the three constituent groups, referred to in the Constitution as ‘Others’, from exercising their right to be elected in one of these positions. Second, it prevents members of constituent peoples living in the ‘wrong’ entity – that is, Bosniacs and Croats living in

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<sup>354</sup> *Sejdić and Finci v. Bosnia and Herzegovina* (2009) 28 B.H.R.C. 201.

<sup>355</sup> BiH Constitution, Article IV.

<sup>356</sup> *Ibid.*, Article V.

the Republika and Serbs living in the Federation – from running for elections.<sup>357</sup> *Sejdić* arose from the first of the two identified problems; it concerns a complaint from two Bosnian citizens, a Roma and a Jew, who despite their experience in politics, were not allowed to run for office because they did not want to declare themselves as members of one of the constituent groups. This state of affairs, the ECtHR held in *Sejdić*, results in violations of the right to vote and freedom from discrimination.<sup>358</sup>

On the one hand, the Court's willingness to decide *Sejdić* suggests that where a divisive conflict arises *after* a peace agreement has been reached (rather than *before*, as was the case in Cyprus), the judiciary will be more willing to become involved in its management. In such cases, the contribution of human rights adjudication to the peacebuilding efforts can be a positive one. On the other, the exceptional nature of the case and the specific factors that pushed the Court to intervene should not be ignored. The ECtHR must have recognised that if it did not intervene in favour of the applicants, it was unlikely that the constitutional provisions in question would be amended in the short to medium-term. Ideally, the amendment should have been the result of political negotiations between the parties, but two such major attempts had already been unsuccessful even before the case reached the European Court.<sup>359</sup> Alternatively, the Constitution could have been amended following the finding of a violation by the Bosnian Constitutional Court. However, the Court had already refused to find a violation on three separate occasions and even invited the ECtHR, if it thought it was necessary, to take upon it the responsibility for such a step.<sup>360</sup> As a result, the ECtHR's intervention in *Sejdić* should be viewed, not as a paradigm example of its willingness to adjudicate divisive conflicts, but rather as an exceptional circumstance.

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<sup>357</sup> This second consequence of the ethnocentric provisions also negatively affects the relocation of refugees to their pre-war properties, thus indirectly compromising the right to property as well. (Ayaki Ito, 'Politicisation of Minority Return in Bosnia-Herzegovina: The First Five Years Examined', *International Journal of Refugee Law*, 13/1/2 (2001), 98 at 118.)

<sup>358</sup> *Sejdić and Finci v. Bosnia and Herzegovina* at [50] and [56].

<sup>359</sup> International Crisis Group, 'Bosnia's Gordian Knot: Constitutional Reform', (Sarajevo/Instabul/Brussels: International Crisis Group, 2012a) at 2-3.

<sup>360</sup> *AP-2678/06* (26 May 2006, BiH CC), Separate Concurring Opinion of Judge Feldman at [5]. (The other two Constitutional Court cases on this issue were *U-5/04* (27 January 2006, BiH CC) and *U-13/05* (29 September 2006, BiH CC).)

In any case, the Court's decision to intervene was arguably not taken lightly. An important consideration in the judgment was the idea that the Dayton Agreement had been signed almost 20 years prior and the danger of violence in the country had been largely overcome.<sup>361</sup> This suggests that had the case reached the Court sooner, when the situation in the country was more unstable and this conflict was even harder to manage, it might have been decided differently. Moreover, Judge Bonello's dissenting judgment expressly articulates the fear that judicial intervention in order to manage this conflict could overall be detrimental for peace in the country. He therefore argues:

‘one cannot possibly disagree with the almost platitudinous Preamble to the Convention that human rights “are the foundation of peace in the world”. Sure they are. But what of exceptionally perverse situations in which the enforcement of human rights could be the trigger for war rather than the conveyor of peace?’<sup>362</sup>

The conclusions of the Bosnian case study are both important and varied. The cases that have been examined provide evidence that there is both a greater capacity and more willingness to use human rights adjudication in order to manage conflicts where these arise *after* the conclusion of a peace agreement. Even then however, the extent of their contribution depends on the divisiveness of the conflict and the forum which it is being adjudicated in. The disagreement in *Sejdić* is much more zero-sum than the one in the vital interest cases because its successful management requires a constitutional amendment that can potentially challenge the hegemony of the ethnic groups in the country. Conversely, this was less of a danger in the vital interest cases since the Court was not asked to decide on the constitutionality of the veto power itself; rather, it only had to provide some guidance on the most appropriate way to use it. It is for this reason that the BiH Constitutional Court refused to adjudicate the first conflict on three different occasions, but was a lot more comfortable contributing to the management of the second. Moreover, it is worth noting that while the conflict in *Sejdić* was indeed more controversial than the disagreement on vital interests, neither

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<sup>361</sup> *Sejdić and Finci v. Bosnia and Herzegovina* at [47]. See, also, Michael Hamilton, 'Transition, Political Loyalties and the Order of the State', in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge: CUP, 2011).

<sup>362</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, Dissenting Opinion of Judge Bonello.

case was as broad in its consequences, or as divisive in its subject matter, as *Erel and Damdelen v. Cyprus*, which had been declared inadmissible by the ECtHR.

One more observation worth making that the two Bosnian conflicts were managed by two different courts. The reasoning of the Constitutional Court in the vital interest cases drew inspiration from the objectives of the right to vote, but was ultimately explicitly based on the democratic principles of the BiH Constitution's Preamble. Such a reasoning could not have legitimately been adopted by the ECtHR, which had it been asked to decide these cases, it would have probably found them inadmissible. This contrasts with *Sejdić* in which it was the ECtHR with its greater expertise in deciding difficult human rights cases, rather than the Constitutional Court, which finally adjudicated the conflict. Thus, the Bosnian case study offers evidence that human rights can contribute to peacebuilding efforts, with the provisos that their adjudication takes place in the appropriate (domestic or international) institution and that the conflict in question concerns relatively minor amendments, rather than overhauling changes to the democratic structures of the country. Bearing in mind these limitations and the fact that even then, judicial intervention might remain controversial, peacebuilders should not exclude the possibility that engaging in political negotiations rather than courtroom battles could be a more effective peacebuilding strategy.

## **5. Adjudicating political conflicts in South Africa**

Unlike conflicts in the other two case studies, which prevent the three elements of peace from being balanced against each other, those in SA have been largely managed successfully. This is mainly because most zero-sum conflicts in the country were dealt with during the political negotiations leading up to the Interim and Final Constitutions, and any disagreements that remained were less divisive and more manageable. Thus, while conflicts have arisen in the country, these concern more practical issues such as the kind of identification documents that should be used in elections<sup>363</sup> and the meaning of specific provisions in the Restitution of Land Rights

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<sup>363</sup> *New National Party v. Government of South Africa* (CCT 9/99) [1999] ZACC 5.

Act [No. 22 of 1994].<sup>364</sup> These conflicts have been adjudicated and the rights to vote and property have greatly contributed to their better management; therefore, the South African experience confirms the international community's expectations about the positive contributions that human rights can make to peace.

The protection of the right to vote in SA differs from that under Article 3-1 of the European Convention in three important respects. First, the right is protected under Section 19 of the SA Constitution rather than an international human rights treaty. As a result, considerations such as national sovereignty, which restrict the ECtHR's interpretation of Article 3-1, are of no significance in SA. Second, Section 19 is more broadly worded than its European equivalent. In addition to protecting the right to vote and to stand for public office (Sections 19(2) and 19(3)), it also refers to every citizen's freedom 'to make political choices', which extend beyond the electoral period. Thus, Section 19(1) includes three non-exhaustive examples of protected political choices, namely the right to form a political party, the right to participate in the activities of a political party, and the right to campaign for a political party or cause. Third, the SA Constitutional Court has often used the country's apartheid history as its starting point, referring to the need to avoid undemocratic practices in the future and interpreting Section 19 broadly.<sup>365</sup> These differences make the ambit of Section 19 broader than that of Article 3-1 and suggest that it can successfully deal with a greater range of political conflicts.

Section 19's contribution to the management of conflicts in the country is illustrated by *New National Party v. Government of South Africa*, a case concerning a disagreement as to what documents could be used for identification purposes during the country's second democratic elections.<sup>366</sup> Acceptable IDs only included documents published under the Identification Acts [No. 72 of 1986] and [No. 68 of 1997] or the Electoral Act [No. 73 of 1998]. This left about 10% of the population unable to vote and resulted in a challenge of the legislation as being incompatible with Section 19. Essentially, the case was about determining the rationale of the law

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<sup>364</sup> *Department of Land Affairs and Others v. Goedgelegen Tropical Fruits (PTY) Ltd* (CCT 69/06) [2007] ZACC 12.

<sup>365</sup> See for example, *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT 12/05) [2006] ZACC 11 at [112]; *Democratic Alliance and Other v. Amos Masondo and Other* (CCT 29/02) [2002] ZACC 28 at [17], [38] and [56]-[58].

<sup>366</sup> *New National Party v. Government of South Africa*.

in question and assessing whether its provisions reasonably limited Section 19; no other body was better suited to carry out this task than the judiciary, which explains its willingness and success in managing this particular conflict. Delivering a well-reasoned judgment, the majority of the Court held that practically speaking, the new identification documents were necessary because the 10% who had older IDs could have been in possession of one of seven different documents, thus considerably confusing the situation at the poll. Moreover, the 1997 Electoral Act had been passed long enough before the elections so that those who wanted to vote had six months within which to apply for the necessary document. Finally, the Court considered the symbolic value of the older documents, which had been issued during the apartheid regime and reflected the race of the person in possession of them. They were a reminder of SA's shameful past, personally offensive to many people and inappropriate for the beginning of democracy in South Africa.

Arguably, the right to property's contribution to conflict management in SA has been even greater than that of the right to vote. The right is protected under Section 25 of the Constitution, which unlike Article 1-1 of the ECHR, *prima facie* protects, not the original owner, but the secondary occupier of the property (that is, the person who acquired the property under apartheid law). In particular, Section 25 starts from the premise that the right-holder is the current occupant and prohibits the arbitrary deprivation of his property,<sup>367</sup> but also allows its expropriation for the purposes of the public interest.<sup>368</sup> '[T]he nation's commitment to land reform', which was considered necessary due to the property injustices carried out during apartheid, is explicitly mentioned as such an interest.<sup>369</sup> Section 25(7) makes specific reference to the remedying of apartheid injustices when it states that

'A person or *community* dispossessed of property after 19 June 1913 *as a result of past racially discriminatory laws or practices* is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.' (My emphasis)

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<sup>367</sup> SA Constitution, Section 25(1).

<sup>368</sup> SA Constitution, Section 25(2).

<sup>369</sup> SA Constitution, Section 25(4).



It is the interpretation of this subsection that has resulted in a number of conflicts, which the Constitutional Court has been called to adjudicate. In particular, there have been disagreements about what is the exact meaning of the phrases ‘community’, ‘as a result of’ and ‘racially discriminatory laws or practices’, all of which affect the number of people who are labelled as victims and are entitled to a remedy.

In relation to the first disagreement, the Court adopted a broad interpretation of the term ‘community’ as ‘a sufficiently cohesive group of persons’, with ‘some element of commonality between the claiming community and the community as it was at the point of dispossession.’<sup>370</sup> It acknowledged that this definition is relatively easy to satisfy, but justified its decision by pointing to the fact that the displacement, and the consequent scattering of the people, did not only have adverse economic consequences for them, but also weakened the bonds holding the community together in the first place.<sup>371</sup> A similarly broad interpretation was given to the phrase ‘as a result of’: the Court pointed out that apartheid laws pushing towards land dispossession were a labyrinth of different statutes preventing non-whites from owning land, and that ‘often the cause of historical dispossession of land rights will not lie in an isolated moment in time or a single act’.<sup>372</sup> Consequently, the phrase ‘as a result of’ was held to mean ‘as a consequence of’, rather than ‘solely as a consequence of’.<sup>373</sup> White landowners might have terminated the tenancy rights of the displaced community for commercial reasons, but this only became possible due to, and was therefore a consequence of, the matrix of racially discriminatory laws that existed in the country at the time. The successful management of both these conflicts was aided by the right to property, which the Court relied on in its analysis. In particular, the judiciary adopted a broad interpretation of the two phrases because it took into account the declared purpose of the law, namely to offer redress to as many victims of the right’s violation as possible.<sup>374</sup>

Similarly, the use of the right to property helped the Court manage the disagreement about the meaning of the phrase ‘racially discriminatory laws and practices’. This

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<sup>370</sup> *Department of Land Affairs and Others v. Goedgelegen Tropical Fruits (PTY) Ltd* at [39].

<sup>371</sup> *Ibid.*, at [42].

<sup>372</sup> *Ibid.*, at [66].

<sup>373</sup> *Ibid.*, at [69].

<sup>374</sup> *Ibid.*, at [42].

became an issue in the case of *Alexkor v Richtersveld Community* in which the appellant, Alexkor, argued that the Richtersveld Community should not be entitled to a remedy because it was displaced, not by one of the statutes directly forcing black displacement, but by the Precious Stones Act [No. 44 of 1927].<sup>375</sup> The Court, rejecting the argument, started its analysis by referring to the need ‘to provide redress to those individuals and communities who were dispossessed of their land rights’.<sup>376</sup> It pointed out that, while the motive of the Precious Stones Act might not have been racially discriminatory, its consequences were, because it made a distinction between registered owners of the land and those who had indigenous law ownership (customary rights to the land). Registered owners were allowed to continue having access to the land and to share its mineral wealth with the government; indigenous law owners on the other hand, were simply excluded from the land and the government exploited their resources without compensating them in any way. Bearing in mind that indigenous law ownership was the main way in which black communities held land in SA and that these rights were not recognised, legitimised or protected by the law, the legislation was inherently racially discriminatory through its consequences, even though it did not seek to achieve ‘the (then) ideal of spatial apartheid’.<sup>377</sup>

Thus, the right to property in SA – although at a first glance seemingly favouring the status quo rather than the remedying of displaced people – has contributed in important ways to the judicial management of the conflicts that are dividing the country. An explanation for this lies in the fact that these conflicts are less divisive than the ones that exist in Cyprus. They are mainly concerned with differences in interpretation of an already agreed upon legal document, rather than with fundamental disagreements about how the society should be structured in the first place; they are in other words, precisely the types of conflicts that Courts were designed to adjudicate. This suggests that the rights’ contribution to conflict management increases as the conflict becomes less zero-sum. In Cyprus, where the conflicts are still majorly divisive, human rights often fail to contribute to their management and can even have negative consequences in this respect. Conversely, in SA, where the disagreements

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<sup>375</sup> *Alexkor Ltd and Another v. The Richtersveld Community and Others* (CCT 19/03) [2003] ZACC 18.

<sup>376</sup> *Ibid.*, at [98].

<sup>377</sup> *Ibid.*, at [97].

essentially have to do with the fine-tuning of existing legislation, human rights can be hugely beneficial. The middle ground is occupied by BiH where adjudication has had positive consequences, but only where certain conditions have been satisfied. This mixed assessment of the contribution of human rights makes it necessary to consider other supplementary (or in some cases even alternative) peacebuilding tools that can also contribute to conflict management.

## **6. Supplementary and alternative peacebuilding tools to human rights**

One reading of the analysis that has been made so far is that there are very few negative consequences to the use of human rights as peacebuilding tools. In most situations, the worst thing that can happen is that their protection will not contribute to the peacebuilding efforts, but will not undermine them either. A more critical reading however, suggests that human rights adjudication has hidden costs, both financial and in terms of distracting the peacebuilders' attention from other, potentially more appropriate tools they could use.<sup>378</sup> The most effective peacebuilding strategy therefore, is to strengthen the protection of human rights when this can have a positive outcome, but use alternative tools where adjudication might contribute in no, or even in negative, ways to conflict management. Which of these approaches should be used depends on how divisive the conflict that peacebuilders seek to manage is in the first place. This section outlines some of the methods and tools that could be used in addition, or as alternatives, to adjudicating human rights in order to more effectively manage political conflicts.

Since the rights to vote and property can significantly contribute to the management of some conflicts, peacebuilders should seek ways to further strengthen and protect them. One way in which this can happen is by broadening the ambit of the rights, thus ensuring that they become applicable to a greater range of political disagreements. Illustrative of this is the fact that due to its narrow ambit, Article 3-1 of the ECHR would have never been able to deal with the range of political conflicts addressed by the much broader Section 19 of the SA Constitution. Even a small change in the wording of the right can make a difference in its contribution to conflict management.

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<sup>378</sup> David Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal*, 15 (2002), 101.

For example, *Aziz* was concerned with the right of TC living in the ROC-controlled areas to vote and be voted in legislative, but not in Presidential elections. This arbitrary distinction between the two could have been avoided if Article 3-1 did not only protect ‘the free expression of the opinion of the people in the choice of the legislature’, but safeguarded their choice in relation to all democratically elected posts instead.

Another reason why Sections 19 and 25 have broader ambits than Articles 3-1 and 1-1 respectively is the fact that the former are interpreted and applied by the domestic judiciary, while the latter by an international court. A Constitutional Court is likely to interpret the Bill of Rights more broadly than the ECtHR is to interpret an international human rights treaty for two reasons. First, because it does not have to take into account national sovereignty considerations and is therefore not limited by the margin of appreciation and second, because it is more likely to take the country’s history and background into account, thus interpreting the right in ways that are not always apparent from its wording. For instance, the SA Constitutional Court has interpreted Sections 19 and 25 widely by seeing them as responses to the country’s apartheid past.<sup>379</sup> Similarly, the BiH Constitutional Court interpreted the right to vote as giving effect to the Constitution’s Preamble which sought to create ‘democratic governmental institutions and fair procedures’ that can ‘produce peaceful relations within a pluralist society.’ This is not to suggest however that domestic courts are always the best forums for conflict management, since international bodies also benefit from a range of advantages. Among them is the fact that they act as fail-safe mechanisms in case the domestic judiciary refuses to intervene. An example in point is the BiH Constitutional Court’s consistent refusal to deal with the disenfranchisement of Others and those residing in the ‘wrong entity’, thus leaving the ECtHR as the only forum that the applicants could take action in. Moreover, an additional advantage of international courts is the fact that they might be more easily perceived as neutral since they do not have a particular stake in the outcome of the case. Thus, another way of strengthening human rights is to ensure that they are

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<sup>379</sup> Moreover, the Court has been encouraged to expand this purposive interpretation of Section 19 further: Theunis Roux, ‘The Principle of Democracy in South African Constitutional Law’, in Stu Woolman and Michael Bishop (eds.), *Constitutional Conversations* (Pretoria: Pretoria University Law Press, 2008); Sujit Choudhry, ‘He Had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’, *Constitutional Court Review* 2 (2009), 1.

protected domestically *and* internationally, so that they can benefit from the strengths of both levels of adjudication.

An additional element affecting the effectiveness of human rights in managing conflicts is the extent to which the judiciary is perceived as neutral. It is therefore important that judges see themselves as legal experts interpreting the contested legal document as objectively as possible, rather than as representatives of their ethnic groups.<sup>380</sup> After a shaky start,<sup>381</sup> the BiH Constitutional Court reached exactly this conclusion and has over the last years started issuing unanimous decisions on a range of divisive and controversial political conflicts.<sup>382</sup> As a result of the Court's achievement to be perceived as neutral, it is today considered as one of the most trustworthy institutions established by Dayton, which makes its decisions more widely accepted and likely to successfully contribute to conflict management.<sup>383</sup> Equally important to delivering objective and well-supported decisions is the appearance that the Court is indeed acting in such a way. It is for this reason that accusations that the ECtHR's decisions are politically motivated, even if they are unfounded, have undermined their peacebuilding contributions in Cyprus. These accusations were repeated for years by TC during the *Loizidou* line of cases, and were swiftly echoed by GC as soon as the Court delivered its *Demopoulos* decision.<sup>384</sup> In such situations an effective response strategy is not only to focus on the law, but to also strengthen the peace-friendly civil society in order to counter the nationalist voices in the country.

The final way to strengthen the peacebuilding potential of human rights through conflict adjudication is for the judiciary to strike the appropriate balance: on the one

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<sup>380</sup> This might be particularly difficult for the judges to achieve if the Constitution of the ethnically divided, post-conflict society itself includes quotas for the ethnic composition of the judiciary; see for example, ROC Constitution, Article 133(1)(1) for the Supreme Constitutional Court and Article 153(1)(1) for the High Court of Justice; BiH Constitution, Article VI(1)(a) and (b). For a more general discussion on the composition of apex courts in divided societies, see Sujit Choudhry and Richard Stacey, 'Independent or Dependent? Constitutional Courts in Divided Societies', in Colin Harvey and Alex Schwartz (eds.), *Rights in Divided Societies* (Oxford: Hart Publishing, 2012).

<sup>381</sup> *U-5/98* (3<sup>rd</sup> Partial Opinion).

<sup>382</sup> *U-8/04*; *U-44/01* (27 February 2004, BiH CC).

<sup>383</sup> David Feldman, 'European Human Rights and Constitution-Building in Post-Conflict Society: The Case of Bosnia and Herzegovina', *Cambridge Yearbook of European Legal Studies*, 7 (2004-2005), 101 at 118.

<sup>384</sup> Kudret Özersay and Ayla Gürel, 'Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle', *Middle Eastern Studies*, 44/2 (2008), 291.

hand, unelected judges should not overstep their mandate and on the other, they should aim to promote security, justice and reconciliation wherever possible. Judicial restraint is valuable because too much intervention for the sake of managing less divisive disagreements can spark much more fundamental and zero sum conflicts about the role of the Courts in a democratic state. Illustrative of this is the experience of the Israeli Supreme Court, which in an attempt to promote human rights and curtail what it perceived to be illiberal practices, it created a constitutional turmoil and reignited a conflict about whether the state should promote secular or Jewish values.<sup>385</sup> Conversely, the Courts should, when given the opportunity, also take brave steps to contribute to conflict management as much as possible. A successful example of this is the BiH *Constituent Peoples case* in which the majority of the Constitutional Court gave broad guidelines about the type of society the Constitution aimed to create and in the process pre-empted and decisively dealt with a number of political conflicts that were likely to arise in the future.<sup>386</sup>

While however the strengthening of and emphasis on human rights can make important contributions to the management of certain conflicts, the most divisive disagreements among them are best addressed using exactly the opposite strategy, namely shifting the peacebuilders' attention to altogether different tools and methods. Thus, the most significant step towards the successful management of zero-sum conflicts is the existence of good negotiators that see eye-to-eye on the importance of a political compromise and are willing to take the appropriate steps to achieve it. Illustrative of this is a contrast between the South African and the Cypriot negotiation processes. The SA negotiation process was successful at least partly because the negotiators of the two sides understood that the status quo was unsustainable; as a result, they compromised and agreed on the Interim Constitution and the five-year sunset clause, both of which avoided deadlocked discussions which could have derailed the negotiating process.<sup>387</sup> Moreover, the negotiators are reported to have had good working relationships with each other, which made them more willing to accept

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<sup>385</sup> Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: CUP, 2011).

<sup>386</sup> *U-5/98 (3<sup>rd</sup> Partial Opinion)*; Anna Morawiec Mansfield, 'Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina', *Columbia Law Review*, 103/8 (2003), 2052. For a more critical reading of the case, see International Crisis Group, 'Bosnia's Future'.

<sup>387</sup> David Welsh, *The Rise and Fall of Apartheid* (Charlottesville: University of Virginia Press, 2009) at Ch. 11 and 12.

a compromise suggested by the other side.<sup>388</sup> Conversely, in Cyprus the negotiations have moved painstakingly slowly and have focused on the technical definitions of terms such as ‘bizonality’, ‘federation’ and ‘confederation’, rather than make any real progress towards a solution.<sup>389</sup> Part of the reason for this disappointing state of affairs is that, unlike SA, the two ethnic groups have generally not been ruled by leaders who are positively predisposed towards a solution, while Turkey’s interventions have for the most part undermined the success prospects of the negotiation process.<sup>390</sup>

A second requirement for the successful management of zero-sum conflicts is the existence of a good opportunity to push the negotiations forward and give some momentum to the negotiating process, especially if this is as long and fruitless as the Cypriot one. For instance, one of the most important factors that led to the Annan Plan, a peace settlement agreed to by the political elites but rejected by the Cypriot public, was the international community’s initiative to join the peace negotiations with Cyprus’ EU accession process.<sup>391</sup> Thus, the promise that upon the public’s acceptance of the Plan, Cyprus would be able to join the EU as a whole, pushed the leaders of both sides to make compromises that they would not otherwise be willing to accept. A similar window of opportunity – perhaps the last one – is afforded to Cypriots today, who in the midst of the economic crisis have discovered a significant amount of hydrocarbons in the island’s exclusive economic zone.<sup>392</sup> This has encouraged the international community to become actively involved in the negotiations and push the two parties to sign a common declaration, listing the areas in which they agree and committing to negotiate the rest.<sup>393</sup> However, whether this process will lead to the reunification of the island remains unclear, thus pointing once more to the significance of peace-friendly political elites.

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<sup>388</sup> Nelson Mandela, *Long Walk to Freedom* (London: Abacus, 1994).

<sup>389</sup> Michális Stavrou Michael, *Resolving the Cyprus Conflict: Negotiating History* (New York: Palgrave Macmillan, 2009).

<sup>390</sup> UN Secretary-General, 'Report of the Secretary-General on His Mission of Good Offices in Cyprus', (1 April 2003) at [130]-[143].

<sup>391</sup> The Comprehensive Settlement of the Cyprus Problem, finalised on 31 March 2004 and put to a referendum on 24 April 2004. (Henceforth, ‘the Annan Plan’); UN Secretary-General (28 May 2004), 'Report of the Secretary-General on his Mission of Good Offices in Cyprus', (New York: United Nations).

<sup>392</sup> International Crisis Group, 'Aphrodite’s Gift: Can Cypriot Gas Power a New Dialogue?', (Nicosia/Instabul/Brussels: International Crisis Group, 2012b).

<sup>393</sup> Cyprus News Agency, 'Anastasiades and Eroglu Meet for Joint Declaration', (11 February 2014) on <http://www.cna.org.cy/webnewsEN.asp?a=604061d88867409ebacddf7faabb9ac9> [accessed 7 June 2014].

A study of the Annan Plan's rise and fall points to two additional factors that can contribute to the successful management of zero-sum conflicts. The first is the involvement of the international community, which can push the parties to overcome their irreconcilable differences by making the necessary compromises. Thus, the UN Secretary-General played an important role during the Cypriot negotiations, both by making it clear to the TC leader that some of his demands were unrealistic and asking him to withdraw them and in giving his own view of what would be the fairer compromise when the parties failed to agree between themselves.<sup>394</sup> It is important to note however, that the international community should always be acting in a neutral capacity, something which has often been disputed in ethnically divided, post-conflict societies. If international actors become involved in order to promote their own countries' or organisations' interests, this is likely to have detrimental consequences for the peacebuilding process because the parties will become even less trusting of each other and even more unwilling to abandon their fixed positions on given issues.

The second factor that can contribute to peacebuilding efforts is the existence of pro-solution media and civil society organisations that will present the negotiations and their outcomes to the public in a positive light rather than seek to criticise shortcomings, which will unavoidably exist.<sup>395</sup> Had these organisations been more vocal in Cyprus in 2004, the Greek Cypriot vote to the referendum, which was overwhelmingly against the Annan Plan, might have been different. The situation today has slightly changed since there is a stronger and better-funded civil society that sends a reconciliatory message to both communities; it is suffering however from serious outreach deficiencies since the majority of the population still remains unaware of its initiatives and most of the efforts of pro-peace organisations are limited to 'preaching to the converted'. A pro-solution civil society is also likely to play an important role in peacebuilding efforts after an agreement has been signed between the two parties.<sup>396</sup> If a conflict arises during the peace negotiation process itself, the

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<sup>394</sup> UN Secretary-General, 'Report of the Secretary-General on His Mission of Good Offices in Cyprus', at [131], [43], [48] and [54].

<sup>395</sup> Raffaele Marchetti and Nathalie Tocci (eds.), *Civil Society, Conflicts and the Politicization of Human Rights* (Tokyo: UN University Press, 2011).

<sup>396</sup> The important contribution of a peace-friendly media in conflict management raises controversial policy questions for peacebuilders: should, for instance, any restrictions exist on who can own a media outlet, bearing in mind his conduct during the war or existing nationalist beliefs?



international community can more legitimately intervene and push the parties towards its successful management. Conversely, it is considerably less acceptable for it to interfere after the peace negotiations have been completed, thus leaving a peace-friendly civil society as the only actor that can push towards compromise.<sup>397</sup> Thus, while the American heavy-handed involvement during the Dayton negotiations was generally seen in a positive light, the continuing interference in everyday politics by the Office of the High Representative after the signing of the agreement has been viewed much less favourably.<sup>398</sup>

## **7. Conclusion**

The expectation that human rights can contribute to the management of political conflicts in ethnically divided, post-conflict societies, and therefore ease the balancing between the three elements of peace, is not wrong. It is however, subject to major qualifications. The first, and one that was discussed in this chapter, is that their contribution operates along a continuum: the more zero-sum the conflict (and therefore, the more detrimental its consequences to peacebuilding attempts in the country), the less likely is human rights adjudication to contribute to its management. The least divisive conflicts will usually be concerned with disagreements of how a law should be interpreted (as was the case with *Alexkor v Richtersveld Community* in SA), or how much weight different considerations should carry (like with the vital interest cases in BiH); both are issues that the judiciary is well-suited to deal with. Conversely, Courts are generally unwilling – and for good reason – to interfere in the management of conflicts that are more appropriately dealt with through political debate and negotiations.

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<sup>397</sup> On the relationship between the international community and civil society in ethnically divided, post-conflict countries, see Roberto Belloni, 'Civil Society and Peacebuilding in Bosnia and Herzegovina', *Journal of Peace Research*, 38 (2) (2001), 163.

<sup>398</sup> Rebecca Everly, 'Assessing the Accountability of the High Representative', in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina* (Surrey: Ashgate, 2008); Richard Caplan, 'Who Guards the Guardians? International Accountability in Bosnia', in David Chandler (ed.), *Peace without Politics? Ten Years of International State Building in Bosnia* (London and New York: Routledge Taylor & Francis Group, 2006); Gerald Knaus and Felix Martin, 'Lessons from Bosnia and Herzegovina: Travails of the European Raj', *Journal of Democracy*, 14 (2003), 64.

This observation has important practical consequences relating to the methods that peacebuilders should adopt. Specifically, it suggests that human rights protection should be used as a conflict management tool only in those cases where it can actually have this effect; in the remaining cases, alternative and more efficient methods should be used instead. As Dudai and McEvoy put it, ‘human rights work has to do more than simply make us feel better about ourselves and what we do. If it doesn’t alter behaviour, [...] by definition, its impact is diminished.’<sup>399</sup> While it is often advisable to take steps to strengthen human rights protection, on other occasions, peacebuilders’ attention and resources should be directed towards other ways of managing conflicts, such as engaging with the political negotiations process to a greater extent.

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<sup>399</sup> Ron Dudai and Kieran McEvoy, 'Thinking Critically About Armed Groups and Human Rights Praxis', *Journal of Human Rights Practice*, 4(1) (2012), 1 at 11.

## **Chapter 6: Conflict management through human rights implementation**

### **1. Introduction**

Every applicant who argues that her human rights have been violated in some way or another, who willingly endures the long and expensive judicial process and the endless legal jargon, does so because she has a set of ultimate goals in mind: to eventually be remedied for her sufferings and/or set a precedent so that other people in her position do not suffer in the same way. Important as the adjudication of the legal issues might be therefore, the litmus test of whether it was all worth it is only satisfied when the judicial decision has been enforced. More specifically in relation to the peacebuilding context, a conflict has only been successfully managed when the grievances in question have been addressed: among others, when the properties of displaced people are returned to them and when the disenfranchised population starts participating, actively or passively, in regular free and fair elections. Thus, what the first part of this chapter (Section 2) is concerned with, is examining the extent to which human rights decisions are actually implemented in practice. The outcome is a mixed one: one country can swiftly implement the decision and might even go beyond its human rights obligations and another might delay the judgment's enforcement for years.

A second consideration concerns the extent to which the legal and institutional amendments that result from the implementation of human rights judgments actually contribute to conflict management and successful peacebuilding. The international community assumes that they do and in many situations, it is proven right. Among the most positive outcomes of human rights implementation in terms of their peacebuilding effect has been the protection of the right to vote in Cyprus and the right to property in Bosnia and Herzegovina (BiH). However, the legal amendments stemming from the implementation of a human rights decision do not always guarantee the successful management of a conflict; a change in the law might make no contribution to peace on the ground, or could even have negative peacebuilding effects. Section 3 provides examples of the positive relationship between human

rights implementation and conflict management, while Section 4 elaborates on the other side of the coin. The final section of this chapter concludes that the main reason for the lack of implementation or for its disappointing contributions to peace is the political unwillingness to act. Acknowledging that nothing can truly replace the absence of a peace-friendly political elite, I offer three suggestions that could nevertheless somewhat mitigate its negative consequences.

## **2. Getting from the adjudication of political conflicts to implementing their solutions**

When the international community contends that human rights can act as effective peacebuilding tools, what it has in mind is not simply their adjudication in a court of law, but also their practical implementation as well. It is for this reason that, since the 1990s peacebuilders have experienced a steep learning curve, which has resulted in a shift of attention from vague human rights pronouncements in the peace agreements to robust mechanisms that ensure their enforcement in practice.<sup>400</sup> This emphasis on human rights implementation is undoubtedly important since peace requires changes which actually take place on the ground rather than in legal texts. Feelings of justice are promoted, not when applicants have a theoretical right to a remedy, but when they are empowered to use it in the real world. Moreover, the non-implementation of a judgment is likely to disappoint the affected parties and undermine reconciliation between them. Finally, respecting and swiftly implementing judicial decisions promotes a sense of security among the population by showing that the executive's power is not exercised arbitrarily and is unlikely to be abused in the future. Yet, despite its importance for peace, implementation of human rights cases does not always follow from their adjudication.

In best case scenarios the implementation of the judicial decision is uneventful and takes place quickly. Case in point is *Aziz v. Cyprus*, where the Turkish Cypriot (TC) applicant's complaint concerned the fact that he was prevented from participating in

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<sup>400</sup> Christine Bell, 'Human Rights, Peace Agreements and Conflict Resolution: Negotiating Justice in Northern Ireland', in Julie Mertus and Jeffrey W. Helsing (eds.), *Human Rights and Conflict: Exploring the Links between Rights, Law and Peacebuilding* (Washington, DC: United States Institute of Peace Press, 2006), 345.

the 2001 Republic of Cyprus (ROC) parliamentary election.<sup>401</sup> Finding a violation, the European Court of Human Rights (ECtHR) ordered the ROC authorities ‘to implement such measures as they consider appropriate to fulfil their obligations to secure the right to vote in compliance with this judgment’.<sup>402</sup> Since Article 3-1 only safeguards ‘the free expression of the opinion of the people in the choice of the legislature’, the ROC could have complied with its Convention obligations by merely amending the law concerning parliamentary elections. Nevertheless, despite the existence of internal nationalist voices, the amended legislation went further and allowed TC residing in the ROC-controlled areas to vote in the presidential, parliamentary and municipal elections. The electoral law also allows TC to run as candidates in the parliamentary and municipal elections, but not the presidential one.<sup>403</sup> As a result of the swift implementation of the case, some TC have run for office, although none of them has managed to win a seat so far.

Another case in which the Court’s decision was promptly implemented is *Matatiele Municipality v. President of the Republic of South Africa*.<sup>404</sup> The facts of the case stem from South Africa (SA)’s division into provinces in 1994, which resulted in some municipalities having territories in two provinces. While this was tolerated for some time, cross-boundary municipalities proved difficult to administer. As a result, the government sought to eliminate them by shifting provincial boundaries and bringing the whole of these municipalities within a single province. Bearing in mind differences in the quality of services between the provinces, conflicts arose as to which province each municipality should be incorporated into. In one of the first cases to reach the Constitutional Court on this issue, it was argued that the legislative decision to place Matatiele Municipality from the province of KwaZulu-Natal to Eastern Cape, did not follow a process that facilitated public involvement as required

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<sup>401</sup> *Aziz v. Cyprus* (2005) 41 E.H.R.R. 11 at [15].

<sup>402</sup> *Ibid.*, at [43].

<sup>403</sup> Ο περί Άσκησης του Δικαιώματος του Εκλέγειν και Εκλέγεσθαι από Μέλη της Τουρκικής Κοινότητας που Έχουν Συνήθη Διαμονή σε Ελεύθερο Έδαφος της Δημοκρατίας (Προσωρινές Διατάξεις) Νόμος του 2006 (2(I)/2006) [The Law concerning the Right to Vote and be Elected of the Members of the Turkish Community that Permanently Reside in the Unoccupied Areas of the Republic (Temporary Order), Law of 2006 (2(I)/2006).]

<sup>404</sup> *Matatiele Municipality and Others v. President of the Republic of South Africa and Others (2)* (CCT 73/05A) [2006] ZACC 12.

by Section 72(1)(a) of the Constitution.<sup>405</sup> The Court, using Section 19 to interpret the phrase ‘to facilitate public involvement’, held that there was an obligation on the legislature to consult and take into account the affected community’s views on the issue.<sup>406</sup> In light of the State’s failure to provide applicants with the opportunity to express their opinion about the legislation in question, the law was found to be in violation of the right to vote. Complying with the Court’s decision, the National Council of Provinces started a consultation process and after its completion, it debated the issue.

On the other hand, the implementation of a decision does not always follow smoothly from the adjudication of the case; sometimes it might even take years, if at all, for it to successfully take place. Illustrative of this is *Loizidou v. Turkey*, where the ECtHR ordered the respondent state to pay the applicant, within three months, approximately 450,000 Cypriot pounds for the violation of her right to property.<sup>407</sup> Turkey ignored the reports of the Committee of Ministers calling for the judgment’s enforcement for years until compensation was finally paid at the end of 2003.<sup>408</sup> This delayed implementation of the judgment was problematic for a range of additional reasons as well. *Loizidou* is the first of a number of identical cases where the Court found a violation of the right to property, yet when implementing the decision Turkey explicitly stated that this did not set a precedent for all the other cases.<sup>409</sup> As a result, all victims whose case was heard and a violation was found after *Loizidou* remain to this day unremedied.<sup>410</sup> Moreover, Turkey was compensating *Loizidou* at the same time as maintaining that the Court’s decision was mistaken.<sup>411</sup> Considering that most human rights victims’ primary concern is an apology, rather than payment of monetary compensation, the implementation of the judgment is unlikely to have

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<sup>405</sup> Section 72(1) states that ‘The National Council of Provinces [the lower chamber in the legislature] must (a) facilitate public involvement in the legislative and other processes of the Council and its committees’.

<sup>406</sup> *Matatiele Municipality and Others v. President of the Republic of South Africa and Others (2)* at [46].

<sup>407</sup> *Loizidou v. Turkey (Article 50)* (1998) 26 E.H.R.R. CD 5.

<sup>408</sup> Committee of Ministers, *Resolution ResDH(2003)190*, (Strasbourg: Council of Europe, 2 December 2003).

<sup>409</sup> BBC News, ‘Turkey Compensates Cyprus Refugee’, 2 December 2003 on <http://news.bbc.co.uk/2/hi/europe/3257880.stm> [accessed 5 June 2014].

<sup>410</sup> See for example, *Strati v. Turkey* (App. No. 16082/90) (22 September 2009, ECtHR) and Committee of Ministers, *Interim Resolution CM/ ResDH (2014) 185*, *Execution of the judgments of the European Court of Human Rights in the cases Varnava, Xenides-Arestis and 32 other cases against Turkey*, (Strasbourg: Council of Europe, 25 September 2014).

<sup>411</sup> *Ibid.*

contributed to feelings of justice for Loizidou herself or for the thousands of Greek Cypriots (GC) who identified with her plight.<sup>412</sup> Perhaps the most serious deficiency of Turkey's response however, is failing to recognise that 'payment of just satisfaction, although it is a great step forward in the implementation of the judgment of 1998, still does not, in fact, implement the basic context of the decision'.<sup>413</sup> Loizidou's complaint was that the presence of Turkish troops in the non-ROC controlled areas of Cyprus prevented her from using and enjoying her property, a situation that still remains in place and constitutes a continuing violation of her right, despite the payment of compensation back in 2003.<sup>414</sup>

An even more unsatisfactory situation exists in Bosnia and Herzegovina (BiH), with *Sejdić and Finci v. BiH*, the right to vote case, remaining unimplemented almost 5 years after the ECtHR's decision.<sup>415</sup> The international community's response to *Sejdić* has been momentous: reports and suggestions for its implementation have been published by the Venice Commission,<sup>416</sup> the Parliamentary Assembly of the Council of Europe,<sup>417</sup> non-governmental organisations<sup>418</sup> and academics.<sup>419</sup> Additionally, its implementation has been made a condition for BiH's EU accession process, something repeated frequently by European officials.<sup>420</sup> They sometimes cajole the Bosnian elite by promising that implementing the decision and joining the EU will

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<sup>412</sup> Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (Random House, 1996) at xviii. (Stating that victims can only 'truly heal' when 'their dignity and suffering have been officially acknowledged', but not equating such acknowledgment with trials.)

<sup>413</sup> Parliamentary Assembly, 'Resolution 1381 Implementation of Decisions of the European Court of Human Rights by Turkey', (Strasbourg: Council of Europe, 2004) at [5].

<sup>414</sup> The Court implicitly acknowledged the fact that Turkey implemented only part of the judgment when it stated in a subsequent case that 'individuals claiming to own property in the north may, in theory, come to the Court periodically and indefinitely to claim loss of rents until a political solution to the Cyprus problem is reached.' (*Demopoulos v. Turkey* (2010) 50 E.H.R.R. SE14 at [111].)

<sup>415</sup> *Sejdić and Finci v. Bosnia and Herzegovina* (2009) 28 B.H.R.C. 201.

<sup>416</sup> Venice Commission, 'Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative', (Strasbourg: Council of Europe, 2005); Venice Commission, 'Opinion on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina', (Strasbourg: Council of Europe, 2006).

<sup>417</sup> Parliamentary Assembly, 'The Functioning of Democratic Institutions in Bosnia and Herzegovina', (Strasbourg: Council of Europe, 2010).

<sup>418</sup> International Crisis Group, 'Bosnia's Future', (Sarajevo/Brussels: International Crisis Group, 2012); International Crisis Group, 'Bosnia's Gordian Knot: Constitutional Reform', (Sarajevo/Instabul/Brussels: International Crisis Group, 2012).

<sup>419</sup> Edin Hodžić and Nenad Stojanović, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights Decision in the Case of Sejdić and Finci v. BiH* (Sarajevo: Analitika Centre for Social Research, 2011).

<sup>420</sup> European Commission, 'Commission Staff Working Document: Bosnia and Herzegovina 2013 Progress Report', (Brussels: European Union, 2013).

have concrete positive economic consequences for the country.<sup>421</sup> On other occasions, they issue warnings that continued non-implementation can ‘potentially undermine the legitimacy and the credibility of the country’s future elected bodies’.<sup>422</sup> Yet neither the carrot nor the stick have motivated Bosnian politicians into action: BiH’s response to the implementation of the case has ranged from apathetic to hostile with all attempts for a constitutional amendment ending so far in failure.<sup>423</sup>

The examples from the three case studies suggest that the implementation prospects of a case depend on a number of factors. First, it is arguably more likely that a decision will be implemented if it is issued by a domestic rather than an international court since ignoring the former can induce a more serious constitutional crisis than the latter. Second, international judgments are more likely to be enforced by countries that respect international and human rights law more generally. For instance, *Aziz*’s swift implementation could be foreseen since Cyprus, generally speaking, has a good human rights record and GC politicians frequently refer to the need to respect and comply with international law. Similarly, *Loizidou*’s problematic implementation is in line with Turkey’s enforcement record of ECtHR decisions more generally. A final factor affecting the implementation prospects of a case is the extent to which the country in question has something to gain by taking such a step. Most typically in the European context this will involve an improvement in the country’s relationship with the EU, which is likely to result in a better economic future. It is therefore not a coincidence that *Loizidou* was implemented in 2003, at a time when Turkey’s interest in the EU had reached its peak. Despite these indications however, *Sejdić* is the ultimate reminder that what really matters is the extent to which there is political willingness for change; if this is absent, the implementation of a decision becomes considerably less likely.

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<sup>421</sup> European Commission, 'Bosnia-Herzegovina – EU: Deep Disappointment on Sejdić-Finci Implementation', (Brussels: Council of Europe, 2014).

<sup>422</sup> Committee of Ministers, *Interim Resolution Cm/ResDH(2013)259*, (Strasbourg: Council of Europe, 22 December 2009).

<sup>423</sup> International Crisis Group, 'Bosnia’s Gordian Knot: Constitutional Reform'.



### **3. Positive peacebuilding effects of human rights implementation**

In best-case scenarios the implementation of a human rights decision or programme will make positive contributions to peace. Since human rights are legal tools, they are likely to result in amendments to the laws, practices and institutions of the country in question, which can be the first step towards changes in the living conditions and perceptions of the people. Examples of such amendments include the revision of the electoral law in Cyprus in order to make it compatible with the ECtHR decision in *Aziz* and the complete transformation of the restitution process in BiH due to the implementation of the right to property. In both of these situations the legal and institutional amendments promoted security and justice and might have even indirectly contributed to feelings of reconciliation.

Illustrative of the peacebuilding effects of implementing human rights decisions is the aftermath of the *Aziz* case in Cyprus. *Aziz* led to the amendment of the electoral law, which allowed TC residing in the ROC-controlled areas to become involved in the democratic process for the first time since 1963 and send the message that they are equal citizens of the Republic. In practical terms, this is significant because it empowers TC, who by voting in ROC elections, are impliedly rejecting Turkey's rhetoric that only a separate and independent 'Turkish Republic of Northern Cyprus' ('TRNC') can protect their interests. Equally importantly, this legal amendment has the potential to start changing the relationship between Greek and Turkish Cypriots. TC who are politically active in the ROC have an incentive and are given the opportunity to communicate with the GC public directly and explain their community's concerns. It is only through discussions such as these that each side can understand the other's point of view and reconciliation can start being promoted on the island. TC who decide to run for elections in the ROC, do so because they imagine and work towards a united Cyprus. They are among the most vocal supporters of peace between the two communities and their empowerment shows to Greek and Turkish Cypriots alike that there is an alternative to the more dominant nationalist views expressed on both sides of the Green Line.

Recently, the ROC's Council of Ministers has further expanded the protection of the right to vote by allowing all TC with a ROC identity card – whether living in the ROC-controlled areas or not – to participate in the elections of the European Parliament.<sup>424</sup> Although the TC parties that are active in the 'TRNC' boycotted the election, 5 TC ran for office – 2 of them in a joint ballot with 4 GC – and 3.19% of all TC with a ROC ID card voted in the elections.<sup>425</sup> No TC was elected in the end, but a future electoral success could give TC the opportunity to express their community's views on the international level. This is important because the non-recognition of the 'TRNC' has meant that TC are represented in the international community by Turkey, whose interests are not always aligned with their own.<sup>426</sup> It transpires therefore that *Aziz's* implementation has over the last 10 years gradually contributed to legal changes on the island that can have positive practical implications for peace.

Equally positive have been the effects of *New National Party v. Government of South Africa*, in which the Constitutional Court held that the requirement that all voters present their bar-coded IDs at polling stations was not a violation of the right to vote.<sup>427</sup> The aftermath of the decision provides evidence of the positive peacebuilding effects that enforcing a Court judgment can have. In particular, *New National Party* positively affected democratic practices – that can contribute to feelings of security, justice and reconciliation – in three ways: the first and most important, is that it legitimised the electoral process as being compatible with the right to vote and allowed the elections to continue as planned, thus providing much-needed stability in the country. The second effect of the decision and the extensive media coverage that followed it, was that these raised public awareness about the need to have a bar-coded ID in order to participate in the election; in turn, this pushed potential voters to apply for the ID in time and avoided potential disappointment and feelings of frustration at the polling stations. Finally, when the Court was delivering its decision, it relied on the government's assurances that the Department of Home Affairs had the capacity to

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<sup>424</sup> Ο Περί της Εκλογής των Μελών του Ευρωπαϊκού Κοινοβουλίου Νόμος του 2004 (10(I)/2004), όπως τροποποιήθηκε από τον 35(I)2014 [The Election of Members of the European Parliament Law of 2014 (10(I)/2004), as amended by 35(I)2014].

<sup>425</sup> Personal communication with the Cyprus Ministry of the Interior, Central Election Service.

<sup>426</sup> See, for example, concerns expressed by TC that the influx of illegal Turkish settlers in non-ROC controlled areas risks making them a minority even within the 'TRNC' itself (Mete Hatay, 'Is the Turkish Cypriot Population Shrinking?', (Nicosia: Peace Research Institute Oslo, 2007).)

<sup>427</sup> *New National Party v. Government of South Africa* (CCT 9/99) [1999] ZACC 5.

deal with last minute applications from citizens seeking to obtain the bar-coded IDs.<sup>428</sup> These assurances turned out to be accurate: while in July 1998 10% of potential voters was not in possession of any IDs, by March 1999, this number had dropped to 2%.<sup>429</sup> The fact that the Department was indeed successful in processing the last minute applications increased the voter turnout, enhanced confidence in government departments to deliver on their promises and further legitimised the electoral results.

Even more successful in terms of building peace however, has been the implementation of the right to property in BiH. The ethnic cleansing strategies used by the warring parties displaced, either within the country or outside its borders, more than half of its population.<sup>430</sup> In an attempt to prevent the cementation of these strategies, the return of displaced people became one of the main peacebuilding objectives in the country.<sup>431</sup> This is reflected both in the strong protections of the right to property in the Constitution and the specific provisions made in Annex 7 of the Dayton Agreement, entitled, 'Refugees and Displaced Persons'.<sup>432</sup> The right to property, like all rights included in the European Convention on Human Rights (ECHR) and its Protocols, is protected under Article II.2 of the Constitution, which makes them directly applicable and gives them priority over all other law. Also, Article II.3.k specifically protects the right to property and Article II.5 states that '[a]ll refugees and displaced persons have the right freely to return to their homes of origin'. In the words of one of the peacebuilders in BiH, protecting property rights 'had the potential to undo the results of ethnic cleansing through the collective effect of hundreds of thousands of decisions to return'.<sup>433</sup> More impressive than the list of rights however, has been the coordinated programme undertaken by the Office of the High Representative to implement these constitutional provisions in practice.

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<sup>428</sup> Ibid., at [42].

<sup>429</sup> Johan Olivier, 'The Independent Electoral Commission (IEC): The Quest for Free and Fair Elections' in Yvonne Muthien (ed.), *Democracy in South Africa: Evaluating the 1999 Election* (Pretoria: Human Sciences Research Council, 1999), 21 at 29.

<sup>430</sup> Charles Philpott, 'Though the Dog Is Dead, the Pig Must Be Killed: Finishing with Property Restitution to Bosnia Herzegovina's IDPs and Refugees', *Journal of Refugee Studies*, 18 (2005), 1 at 1.

<sup>431</sup> Annex 7 at [1]; Lisa D'Onofrio, 'Welcome Home? Minority Return in South-East Reublika Srpska', *Sussex Migration Working Paper No. 19*, (2004).

<sup>432</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995, Annex 7.

<sup>433</sup> Rhodri C. Williams, 'The Significance of Property Restitution to Sustainable Return in Bosnia and Herzegovina', *International Migration*, 44/3 (2006), 39 at 43.

The success of the property implementation programme becomes even more obvious because of a change in strategy that took place in 1999, which resulted in a clear ‘before and after’ picture. The ‘before’ picture is a rather bleak one: in the early stages after Dayton, the international community’s strategy was to encourage group returns in areas where this was considered safe, but to actively discourage them in others where it was believed that the conditions were not ripe yet. The strategy’s reliance on the political right to return rested on the idea that peacebuilders could encourage the ethnic groups to accept minority returnees in their areas of effective control through political pressure and economic incentives.<sup>434</sup> However, the implementation of the political right to return, which essentially prioritised feelings of security over those of justice, was largely a failure because all three ethnic groups proved uncooperative. Despite encouraging promises, they adopted discriminatory laws against minorities, prioritised restitution applications by their own community members and were slow to stop any nationalist violence that took place upon minority returns.<sup>435</sup> This political unwillingness to encourage minority returns was easily camouflaged under the complexity of and contradictions between the laws that existed at the time.<sup>436</sup> Consequently, between 1996 and 2000, the first time the international community started systematically collecting statistics, only 12% of applications by displaced people had been dealt with.<sup>437</sup>

The huge contrast between the ‘before’ and ‘after’ pictures is largely attributed to the abandonment of the *political* right to return and the implementation of the *legal* right to property instead. The change took place in 1999 when the international community introduced the Property Legislation Implementation Plan (PLIP); this relied on a series of legislative amendments pushed through by the High Representative and on

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<sup>434</sup> The term ‘minority returnees’ refers to displaced people returning to areas where they are not in the majority ethnic group.

<sup>435</sup> Ayaki Ito, ‘Politicisation of Minority Return in Bosnia-Herzegovina: The First Five Years Examined’, *International Journal of Refugee Law*, 13/1/2 (2001), 98.

<sup>436</sup> Shortly after the war, different and often contradictory sets of laws existed and were selectively applied: laws passed by the ex-Yugoslav state, pre-war laws that only applied to BiH, wartime legislation (which was different according to the ethnic group that controlled each area), the Constitution, post-war legislation and international instruments that were directly applicable at the national level. For an excellent background to the property laws in BiH, see Philpott, ‘Though the Dog Is Dead, the Pig Must Be Killed’.

<sup>437</sup> Office of the High Representative, ‘Statistics: Implementation of the Property Laws in Bosnia and Herzegovina’, (Sarajevo: Office of the High Representative, 31 May 2000), on <http://www.ohr.int/plip/pdf/PLIP5.00.PDF> [accessed 10 June 2014].

the active involvement of international peacebuilders for their enforcement in practice. The amendments included retrospectively putting out of force the discriminatory property laws that had been passed during and before the war, harmonising the claim procedures in both constituent states and creating a process that was heavily weighted in favour of the claimants. In particular, displaced people only had to show that they had pre-war rights to the property and the responsible authority had 30 days to investigate the claim. If the current occupant had no right to occupy the property or had access to other housing, he had to vacate it within 15 days. If he was in need of alternative accommodation, the authorities had 90 days to secure it for him and he had to be evicted even if no such accommodation had been provided.<sup>438</sup> Although these deadlines were often exceeded by several months, the new legislation jump-started the process and prevented uncooperative public officials from using excuses.

It was estimated that if restitution continued with the same rate as it did before 1999, the process would have taken another 40 years to complete.<sup>439</sup> Rather, the international community's implementation of the legal right to property meant that by December 2003, when PLIP came to an end, 93% of the property claims had been handled and the few remaining cases were handed over to the local authorities to complete.<sup>440</sup> Ultimately, '[t]he restoration of property rights and the return of refugees and displaced persons to their homes must rank as the most dramatic success of the peace process in Bosnia and Herzegovina'.<sup>441</sup> At the most basic level, the legislative amendments, resulting in an increasing number of displaced people empowered to return to their houses, promoted security by sending the message that the war was truly over and the conflict was being left behind. As the United Nations High Commissioner for Refugees (UNHRC) put it, '[w]hen they choose voluntarily to go back to their homeland, refugees are, quite literally, voting with their feet and

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<sup>438</sup> Philpott, 'Though the Dog Is Dead, the Pig Must Be Killed'.

<sup>439</sup> Office of the High Representative, 'PLIP – Non Negotiable Principles in the Context of the Property Law Implementation', (Sarajevo: Office of the High Representative, 7 March 2000), on <http://www.ohr.int/plip> [accessed 10 May 2014].

<sup>440</sup> Office of the High Representative, 'Statistics: Implementation of the Property Laws in Bosnia and Herzegovina', (Sarajevo: Office of the High Representative, 31 December 2003), on [http://www.ohr.int/plip/pdf/plip\\_12.03.PDF](http://www.ohr.int/plip/pdf/plip_12.03.PDF) [accessed 10 June 2014].

<sup>441</sup> Marcus Cox and Madeline Garlick, 'Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina', in Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (New York: Transnational Publishers, 2003), 65 at 65.

expressing confidence in the future of their country.’<sup>442</sup> It is arguably for this reason that the nationalist leaders in BiH were keen to prevent minority returns in the country and why it is considered such a big success of the international community that this was prevented.

More importantly, the implementation programme promoted peace by contributing to feelings of justice in three ways. First, PLIP moved beyond empty political promises and put in place clear laws and procedures, which displaced people could rely on in practice. This empowered the applicants since it clarified the process through which they could demand – rather than merely wait at the discretion of the uncooperative state – for the return of their properties. Second, the clear legal provisions made it easy to spot state officials who refused to protect the right to property and to impose strict penalties on them. As a result, in November 1999 the High Representative removed 22 officials from office for failing to comply with PLIP and sent the message that the return of displaced people was a peacebuilding priority.<sup>443</sup> Third, implementing the right to property helped coordinate different international organisations that were operating in BiH; for instance, Organisation for Security and Cooperation in Europe (OSCE) and UNHCR officials were sent in every municipality in the country to collect statistics and deliver PLIP guidelines to the local authorities.<sup>444</sup> This resulted in a speedier and more professional response by the authorities since it, for example, stopped the popular practice of prioritising ‘easy applications’ (usually returns where the applicant was in the majority or where there was no secondary occupier in the property). Instead, all applications were treated in the chronological order that they had been submitted, thus preventing the privileging of applicants because of their personal connections or ethnic group.<sup>445</sup> This also gave a rough indication to people as to when their claim would be dealt with, thus allowing them to better prepare, financially and psychologically for their return. Clearly therefore, the implementation of the right to property in BiH, like the enforcement of

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<sup>442</sup> UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (Oxford: OUP, 1997) at 162.

<sup>443</sup> D’Onofrio, ‘Welcome Home? Minority Return in South-East Republika Srpska’ at 9.

<sup>444</sup> Philpott, ‘Though the Dog Is Dead, the Pig Must Be Killed’.

<sup>445</sup> Ibid. One of the few exceptions to this strict chronological order was the prioritisation of policemen, with the rationale being that they could make minority returnees feel more secure. This is an example of a conscious policy decision to prioritise the element of security over the element of justice in the post-conflict society.

the right to vote in Cyprus, resulted in practical changes that promoted peace in the respective countries.

#### **4. The other side of the coin: dangers and deficiencies of human rights implementation**

As encouraging as the ‘success stories’ of human rights implementation might be, they do not reflect the complete picture of what happens in ethnically divided, post-conflict societies. While their enforcement has in some cases had positive implications for peace, examples from all three case studies suggest that the legal and institutional amendments deriving from human rights judgments do not always lead to better conflict management. The main factor contributing to bad implementation policies is the political elite’s unwillingness to implement the decision in the first place. This can result in legal remedies that are technically compatible with human rights, but make no real contributions to peace, as was the case with the implementation of the right to property in Cyprus. More worryingly, the outcome of *Matatiele* (SA) and suggestions for *Sejdić*’s enforcement (BiH), suggest that a badly implemented human rights decision can potentially even have negative consequences for the divided society. Importantly, the argument here is not that other peacebuilding tools should have supplemented the legal or institutional amendments that resulted from the right’s implementation; rather, it is that the right’s enforcement should have resulted in altogether different laws and institutions in the first place. Ultimately, not every remedy that is compatible with human rights necessarily also contributes to peace.

Cyprus is a unique case with regards to its implementation of the right to property because the current status quo on the island has resulted in different remedies being available to Greek and Turkish Cypriot displaced people. According to the ECtHR’s case law, which has been the driving force behind the implementation of these remedies, until a peace settlement has been agreed, any violations of (Greek Cypriots’) property rights in the occupied part of the island are attributable to Turkey, while Cyprus is responsible for (Turkish Cypriots’) rights in the ROC-controlled

areas.<sup>446</sup> Turkey's response to GC displacement came, after years of delay, in the form of the Immovable Property Commission (IPC), which the ECtHR found to be an effective remedy in *Demopoulos v. Turkey*.<sup>447</sup> The IPC is a 6-member body consisting of 4 TC and 2 international members. It has jurisdiction to hear cases concerning property violations arising from the 1974 war and remedy the applicants in one of three ways: provide restitution and/or compensation for the loss of income and for the property itself or exchange the GC property in question with a TC property of equivalent value in the ROC-controlled area of the island.<sup>448</sup>

Conversely, TC rights in the ROC-controlled areas are managed through the Custodianship regime. The ROC starts from the premise that the rightful owners of the properties in question are the Turkish Cypriots, but that it is necessary for the Custodian, who is the ROC Minister of the Interior, to manage and protect them on their behalf until the conflict has been resolved.<sup>449</sup> Despite the seemingly altruistic motives of the legislation, the legal impossibility of opting out of this system of protection meant that in practice TC were prevented from accessing and controlling their properties, which resulted in possibly rights-violating situations. Thus, in 2010 the ROC introduced a series of amendments to the law that made it possible for TC to apply for the return of their property and opt out of the Custodianship regime. This amendment was the result of a case, *Sofi v. Cyprus*, that had been submitted to the ECtHR by a TC complaining of a violation of her right to property.<sup>450</sup> Presumably afraid that *Sofi* would be as detrimental to the ROC as *Loizidou* had been to Turkey, Cyprus settled and committed to amend its Custodianship legislation. *Kazali v. Cyprus*, a TC attempt to challenge this amended state of affairs as still being in violation of the right to property was found inadmissible by the ECtHR,<sup>451</sup> it held that being allowed to apply to the Custodian for the return of their property and then to

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<sup>446</sup> *Loizidou v. Turkey* (Merits) (1997) 23 E.H.R.R. 513 at [64].

<sup>447</sup> *Demopoulos v. Turkey*.

<sup>448</sup> 'TRNC', Law for the Compensation, Exchange and Restitution of Immovable Properties which are Within the Scope of Sub- paragraph (B) of Paragraph 1 of Article 159 of the Constitution, Law 67/2005. The remedy of exchange becomes technically possible because according to 'TRNC' law, the properties that were owned by TC in the ROC-controlled areas now belong to the 'TRNC' itself, which can do as it pleases with them. ('TRNC', Law for Housing, Allocation of Land, and Property of Equal Value, Law 41/1977.) For an excellent legal background of the issue, see International Crisis Group, 'Cyprus: Bridging the Property Divide', (Europe Report No210; Nicosia/Istanbul/Brussels, 2009).

<sup>449</sup> The Law Concerning Turkish-Cypriot Properties (Administration and Other Matters) (Temporary Provisions) Law of 1991 (Law 139/1991).

<sup>450</sup> *Sofi v. Cyprus* (App. No. 18163/04) (14 January 2010, ECtHR).

<sup>451</sup> *Kazali v. Cyprus* (App. No. 49247/08) (6 March 2012, ECtHR).



appeal the decision in the ROC Courts constituted effective domestic remedies that had not been exhausted.<sup>452</sup>

According to ECHR case law therefore, the right to property of GC is sufficiently protected through recourse to the IPC and that of TC by allowing them to opt out of the Custodianship regime; possible dissatisfaction with the decisions of these two bodies can be expressed through appeals in the 'TRNC' and ROC Courts respectively. Yet, neither of the two implementation mechanisms has resulted in an improvement of inter-ethnic relations on the island. Both remedies technically provide victims with the legal tools to demand redress for past injustices in the clearest and most direct way. Importantly, applicants that make use of these mechanisms are remedied immediately, rather than after the conclusion of the peace negotiations. Nevertheless, both are problematic in that although they technically protect the right to property, they have not actually resulted in efficient remedies in practice. The most serious deficiency of both remedies and in particular the IPC is one of legitimacy. According to the majority of GC, applying to the IPC and being bound by its decisions is tantamount to recognising the legitimacy and legality of the 'TRNC'; since the 'TRNC' is a product of the illegal Turkish invasion, this is unacceptable.<sup>453</sup> Thus, instead of the Commission being perceived by GC as a justice and reconciliation-promoting tool, it has been viewed as a way to trick them into giving up their property claims and accepting the current status quo as legal. The ECtHR's response to these concerns is theoretically persuasive: the IPC is, legally speaking, not a product of the 'TRNC', but of Turkey.<sup>454</sup> However, this technical assessment is unconvincing to those aware of the context in which the IPC operates: the Commission was the product of a 'TRNC' law, it is based in the non-ROC controlled part of Cyprus rather than Turkey and its non-international members are TC, not Turks.<sup>455</sup> Due to its perceived illegitimacy and unpopularity, GC who apply to the IPC do so in secret and

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<sup>452</sup> Nasia Hadjigeorgiou, 'Case note on *Kazali and Others v. Cyprus*' *Cyprus Human Rights Law Review* (2013) 2(1), 103.

<sup>453</sup> *Demopoulos v. Turkey* at [92]-[98].

<sup>454</sup> *Ibid.*, at [95]-[98].

<sup>455</sup> Alexia Solomou, 'Case Note on *Demopoulos & Others v. Turkey* (Admissibility)', *American Journal of International Law*, 104/4 (2010), 628; Loukis G. Loucaides, 'Is the European Court of Human Rights Still a Principled Court of Human Rights after the *Demopoulos* Case?', *Leiden Journal of International Law*, 24/2 (2011), 435.

in fear that that their actions will be criticised by the rest of their community, factors that are unlikely to promote feelings of justice and reconciliation among victims.

Moreover, while the preferred remedy for most GC has historically been restitution, the IPC is only willing to consider it as a possibility when the property is not in the possession of a TC and is not used in any way by the 'TRNC'.<sup>456</sup> Since this excludes most properties, the Commission has so far only granted restitution in 7 out of the approximately 500 cases it has decided.<sup>457</sup> Displaced people that could potentially be entitled to restitution under the IPC law are those who own property in the empty town of Varosha.<sup>458</sup> However, any applications that have reached the IPC about these properties have been pushed back to the end of the queue and have not been decided at all, thus further undermining the Commission's legitimacy in the eyes of the GC public.<sup>459</sup> As a result, the ECtHR's insistence that the IPC should allow for the possibility of restitution, which Turkey technically complied with, has only affected the wording of the law rather than the remedy's effectiveness in promoting justice.<sup>460</sup> Equally problematic has been the remedy of compensation, which, GC argue, is not paid at market price.<sup>461</sup> This has resulted in accusations, at least some of which are true, that most applicants settle for compensation due to financial need rather than because they perceive it as just. However, if this is the motivation for their applications, it is unlikely that the remedy will majorly contribute to feelings of justice and reconciliation. Reflective of the deficiencies of the IPC is the fact that 1 in every 5 applications submitted to the Commission is revoked before a decision is made.<sup>462</sup> Ultimately therefore, the ECtHR's case law was implemented, but the existence of legal remedies has not actually promoted peace on the ground.

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<sup>456</sup> *Meleagrou v. Turkey* (App. No. 14434/09) (2 April 2013, ECtHR) at [5].

<sup>457</sup> Presidency of Immovable Property Commission, 'Monthly Bulletin, May 2014', (Nicosia: Immovable Property Commission, 30 May 2014), on [http://www.tamk.gov.ct.tr/dokuman/istatistik\\_subat14ing.pdf](http://www.tamk.gov.ct.tr/dokuman/istatistik_subat14ing.pdf) [accessed 7 June 2014] at 7.

<sup>458</sup> Varosha was a vibrant, fast-developing tourist town in Cyprus, which was left abandoned in 1974 when its inhabitants fled to avoid the atrocities of the war. Tragically, it has remained empty ever since: it is on the north side of the Green Line, but no GC or TC are allowed to visit since it is reserved for Turkish military personnel only. Since the abandoned properties in Varosha are not inhabited by TC and are not used in any other way by the 'TRNC', they would be ideal cases for restitution.

<sup>459</sup> The fact that cases concerning Varosha are being delayed by the IPC was flagged up by lawyers representing GC to the Commission and confirmed by the President of the IPC himself (files with the author).

<sup>460</sup> *Demopoulos v. Turkey* at [119].

<sup>461</sup> For a discussion of this issue, see *Demopoulos v. Turkey* at [121]-[123].

<sup>462</sup> Presidency of Immovable Property Commission, 'Monthly Bulletin, May 2014'.

Similar difficulties exist in relation to justice and reconciliation for TC, notwithstanding the law's amendment and the possibility to opt out of the Custodianship regime. All TC can technically apply to acquire control of their properties, but in fact, very few actually achieve this. When the Custodian considers lifting his powers from a specific property, he takes a number of factors into account that in practice restrict access to justice for TC. For instance, it is extremely unlikely that a TC who permanently lives in the non-ROC controlled area of the island or who occupies GC land there will be successful in lifting the Custodianship from his property.<sup>463</sup> Moreover, in most situations where the Custodianship has been lifted, this was done on the condition that the property would be immediately sold either to a GC buyer or the ROC, thus preventing TC from using their properties as they see fit and feeling truly remedied.<sup>464</sup> Feelings of injustice are further heightened by the fact that even in situations where the property has been returned, no applicant has so far received any compensation for loss of use of his property from 1974 until today.<sup>465</sup> Unavoidably, a remedy that only applies to a small minority of potential applicants and which is provided under such strict conditions, even if it has in principle been approved by the ECtHR, is unlikely to contribute to successful conflict management in the country. Thus, even though the IPC and the amended Custodianship legislation technically implement the ECtHR's decisions, they have not promoted peace in any meaningful way. Both must be replaced by other laws and practices that not only protect human rights, but also give effect to the demands of peace more broadly.

The main reason for the disappointing peacebuilding effects of the right's implementation in Cyprus is that the two communities are still divided by a fundamental conflict and each side tries to deviate as little as possible from its ideal solution. However, similar problems with the content of the implemented remedies exist in relation to less divisive conflicts in BiH and SA as well. For instance, the South African Constitutional Court's decision in *Matatiele*, the boundary-changing

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<sup>463</sup> Turkish-Cypriot Properties (Administration and Other Matters) (Temporary Provisions) Law of 1991 (Law 139/1991), Section 3. This example also illustrates that in ethnically divided societies, a single individual can be both a perpetrator (by occupying other people's property) and a victim (by having her property occupied), a situation that human rights law has difficulties in reflecting.

<sup>464</sup> *Kazali v. Cyprus* at [137]. There are no more recent publicly available statistics on this as the ROC considers the Custodian's operations a matter of national security and keeps its activities confidential.

<sup>465</sup> This has been confirmed by the Office of the Custodian as standard practice; comments have also been made that there is no intention of changing this in the future. (Personal communication with the Ministry of the Interior on 5 June 2014).

case discussed in Section 2, was swiftly implemented, but this did not result in the better management of the conflict in question; in fact, its enforcement might have even had the opposite effect. This is because while *Matatiele* was technically complied with, the outcome of the consultation procedure was actually ignored: Parliament overlooked people's preference to keep Matatiele as part of KwaZulu-Natal and incorporated it into the province of Eastern Cape instead. *Matatiele*'s disappointing implementation gave rise to a second case where it was argued that the consultation was merely a 'formalistic sham' and that the boundary change should be found unconstitutional once again.<sup>466</sup> The Court rejected the argument and held that the fact that there was no change in the legislative decision did not mean that an effective consultation had not taken place. Arguing that it would be inappropriate to replace the legislative assessment with its own, it restrained itself to checking whether the applicants' submissions were among those received by the legislature rather than whether a fruitful debate, taking into account these submissions, had taken place in Parliament.<sup>467</sup>

The legislative decision to ignore the results of the consultation process and the Court's refusal to intervene further despite the disappointing outcome of *Matatiele*'s implementation are unlikely to have contributed to peace in SA. Since Parliament maintained its original stance even after it became unequivocally aware of the public's views, most people saw the law as unjust and disrespectful of their wishes. Especially in SA where the memories of political disempowerment are still fresh, so blatantly ignoring the popular mandate can undermine reconciliation and challenge the government's legitimacy. Perhaps most worryingly, the Court's unwillingness to invalidate the unpopular decision, occasionally even resulted in the eruption of violence, also leading to feelings of insecurity.<sup>468</sup> Troubling and sad as these consequences are however, the Court was right to reach this decision. 'Courts deal with bad law; voters must deal with bad politics' and the specific way in which a case will be implemented is a political, not a legal issue.<sup>469</sup> Ignoring the distinction between the two risks converting a relatively easily manageable practical

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<sup>466</sup> *Poverty Alleviation Network and Others v. President of the Republic of South Africa and Others* (CCT 86/08) [2010] ZACC 5 at [59].

<sup>467</sup> *Ibid.*, at [63] and [73]-[74].

<sup>468</sup> *Merafong Demarcation Forum v. President of the Republic of South Africa* (CCT 41/07) [2008] ZACC 10 at [303].

<sup>469</sup> *Ibid.*, at [308].

disagreement into a much more fundamental conflict concerning the role of unelected judges in a constitutional democracy. While the Court was able to adjudicate the conflict therefore, it was unable to influence the government's decisions beyond that, which resulted in the right to vote being implemented in such a way that it had detrimental, instead of positive, peacebuilding effects for SA. This case provides confirmation of the fact that adjudicating and technically complying with a decision are only the first steps towards peace. It is equally important that the resulting legal amendments actually contribute to peace, rather than simply being compatible with the wording of the Court's decision.

However, it is *Sejdić and Finci v. BiH* that demonstrates the most damaging consequences that a bad implementation decision can have on peace. The ECtHR, finding that preventing those in the category of 'Others' from running for office was a violation of Article 3-1, ordered that BiH's Constitution was amended accordingly. The case has remained unenforced for almost 5 years, but arguably, even if the case was implemented, it is not clear that this would have necessarily been a positive step towards peace. In fact, some of the suggestions for *Sejdić's* implementation risk having the opposite effect by further fragmenting the political scene in the country. For instance, one suggestion has been to create a fourth caucus consisting of Others, thus allowing them to be elected and protecting their vital interests through the veto power.<sup>470</sup> Nevertheless, this suggestion fails to take into account the heterogeneity of the category of Others and the difficulties that would arise in determining their vital interests in order to exercise the veto power on their behalf. Additionally, since ethnicity is a self-defining characteristic in BiH politics, there is a risk that members of the Constituent Peoples would hijack the Others group in order to obtain additional power in the legislature. Even if these dangers did not materialise, giving the veto power to a tiny population group in the country is likely to be perceived by the rest of the people as unjust.<sup>471</sup> Most problematically however, this 'pluralisation of ethnocracy'<sup>472</sup> and the overuse of group rights, which assume that people can only be

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<sup>470</sup> This was suggested by Bosnian elites in 2012.

<sup>471</sup> It is unclear how many Others exist in BiH today. In the 1990 census, about 8% of the population identified itself as 'Other', with 'Yugoslav', a category that is today obsolete, making up about 70% of the group. (Census, 1991, 'Ethnic composition of Bosnia-Herzegovina population, by municipalities and settlements, 1991', Zavod za statistiku Bosne i Hercegovine, Bilten no. 234, Sarajevo.)

<sup>472</sup> Hodžić and Stojanović, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights Decision in the Case of Sejdić and Finci v. BiH* at 15.

represented by members of their ethnic group, ignore the detrimental effects that separating a population into pre-determined categories can have on reconciliation.

The ‘fourth caucus’ implementation suggestion is perfectly compatible with, and in fact goes beyond what *Sejdić* would require. It allows Others to be voted in both Chambers of the Legislative Assembly and in the Presidency and also gives them the veto power as a way of further protecting their status. Yet, it fails to successfully manage the political conflict in question since it arguably creates more problems than it resolves. This is because conflicts such as the one the ECtHR was called to manage in *Sejdić* emerge from ethnic differences between groups, yet the right to vote is blind to such differences. The main concern of the right to vote is to safeguard individual interests; the interests of people as members of ethnic groups are taken into account only indirectly, if at all. Numerous suggestions are technically compatible with the right to vote: among them is the creation of a fourth caucus, the overall elimination of ethnic protection in favour of a one person-one vote system or the adoption of a more complicated formula that balances individual and ethnic interests. Of the three, only the last suggestion is likely to be accepted by the parties *and* contribute to conflict management in BiH, thus suggesting that a state of affairs might be human rights compatible, yet fail to contribute to peace.

This section, therefore, provides evidence that the human rights compatibility of the law does not also guarantee that it will make positive contributions to peace. Enforcement of a human rights decision might not make any positive contributions to conflict-management in the country, as was the case with the right to property in Cyprus, or could even have detrimental consequences for peacebuilding attempts on the ground, as was the case with *Matatiele*’s implementation in SA and suggestions for *Sejdić*’s enforcement in BiH. Building on the conclusions of the previous chapter, it transpires that human rights can act as efficient peacebuilding tools under increasingly specific circumstances: only when they are addressing practical disagreements rather than fundamental conflicts, when the Court’s decision in such a case has been enforced and when the legal and institutional amendments stemming from its enforcement, in addition to being human rights compatible, meet the independent objectives of also promoting security, justice and reconciliation.

## **5. Dealing with the shortcomings of human rights implementation**

Whether the adjudication of a case will have positive peacebuilding consequences depends on whether the decision is implemented in the first place and, if it is, on the actual content of the implementation decision. Both steps of the process rely on the existence of political willingness to manage the conflict and work towards peace. Where this is absent, the Court's decision is likely to remain unenforced, or if implemented, to not really contribute to peace in practice. Problematically however, a peace-friendly political elite is often precisely what is missing in ethnically divided, post-conflict societies and what human rights are expected to replace in the first place. There are a number of alternative strategies that can deal with the absence of political willingness for change, three of which are discussed here in detail: the international community can become more involved in the peacebuilding process, the judiciary can adopt a more activist stance and steps can be taken to strengthen the peace-friendly civil society. Which of these strategies will be used and where, depends on the context of the different ethnically divided societies, thus dismissing the liberal assumption that there is one peacebuilding recipe that fits all. Moreover, effective as these alternative suggestions might be in alleviating the unwillingness to implement a decision, they can never really replace a genuine political commitment to peace.

The importance of political willingness in implementing human rights decisions and remedying a problematic state of affairs is illustrated through the property situation in Cyprus. A persuasive explanation for the deficiencies of the IPC is that Turkey created it while claiming at the same time that it did not recognise the violation of the very rights it was seeking to remedy.<sup>473</sup> Similarly, the ROC remedy is disappointing because Cyprus amended its law to allow the lifting of the Custodianship, after settling with Ms. Sofi and in fear of prospective endless legal battles, rather than due to a genuine recognition that its practices were problematic.<sup>474</sup> As a result of this political unwillingness to remedy the applicants, both Cyprus and Turkey are doing as little as possible to protect the victims' property rights so long as they are not caught by the ECtHR's supervision. This approach however, makes feelings of justice and

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<sup>473</sup> BBC News, 'Turkey Compensates Cyprus Refugee'.

<sup>474</sup> In fact, in unofficial discussions of the author with civil servants working for the Custodian, *Sofi*, far from being described as a turning point in ROC policies concerning the right to property, was characterised as a 'mistaken handling' of the situation.

reconciliation among the population even harder to flourish, despite the law's technical compliance with human rights. Had political willingness to promote peace been present, the two sides would have adopted different legal measures and managed the conflicts in question more effectively. Similar conclusions can also be drawn from the SA case study: *Matatiele*'s aftermath has been so disappointing and detrimental to peace precisely because the politicians' unwillingness to implement the decision meant that they complied with the letter, but not the spirit of the law, thus making the population feel cheated.

In the absence of such political willingness, one alternative strategy is to involve the international community in the political decision-making of the divided country. Especially where international peacebuilders are given extensive decision-making powers, as is the case with the High Representative in BiH, this can make the conflict-management process less difficult since nationalist, uncooperative leaders can be circumvented.<sup>475</sup> Illustrative of the effects of this strategy is not just the Dayton Peace Agreement itself, but also the launching of PLIP, which was almost exclusively run and funded by the international community. Nevertheless, adopting such a strategy is not always possible, especially in countries such as SA, which have traditionally relied on domestic peacebuilding programmes. Moreover, if the international community does become involved in the conflict-management process, it must do so while bearing in mind the future consequences of such a decision. Years of experience and mistakes in BiH suggest that while it is easier for international peacebuilders to override the elected representatives and take the difficult decisions itself, this can have negative long-term effects. Bosnian politicians know that if the situation gets bad or urgent enough, the High Representative will intervene, while they can watch by, criticising any necessary action that he takes, without engaging in political inter-ethnic cooperation or suffering any political cost themselves. Finally, if the international community's objective is to set an example that domestic politicians are to follow after its withdrawal, it should act in accordance with the democratic values it proclaims, even if that slows down the peacebuilding process. The High

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<sup>475</sup> For some background information on the High Representative, see Chapter 1, Section 5(a). Moreover, a rich literature exists on the legitimacy and effectiveness of this institution in BiH: Richard Caplan, 'Who Guards the Guardians? International Accountability in Bosnia', in David Chandler (ed.), *Peace without Politics? Ten Years of International State Building in Bosnia* (London and New York: Routledge Taylor & Francis Group, 2006), 157; Gergana Dimitrova, 'Democracy and International Intervention in Bosnia and Herzegovina', *Central European Political Studies Review*, VII/1 (2005).



Representative failed to do that when he issued a statement ‘overruling’ the Constitutional Court’s judgment that one of his decisions was incompatible with human rights.<sup>476</sup>

Potentially therefore, the best way for the international community to contribute to conflict management is through more indirect intervention, whereby pressure is put on politicians to cooperate with each other and implement beneficial policies for peace, rather than by actually hijacking the democratic process itself. Nevertheless, attempts to do that in relation to *Sejdić*’s implementation have been completely unsuccessful, while political pressure on Turkey to implement the ECtHR right to property decisions in Cyprus has largely resulted in only a success on paper. This confirms a basic limitation of human rights – that they depend on the existence of political willingness for change – and goes against the international community’s assumption that in ethnically divided, post-conflict societies they can in fact make up for its absence.

An alternative way in which the international community could help in the implementation of human rights and the management of political conflicts is by offering technical expertise, either in the form of legal advice or through insights concerning the experiences of other divided societies. This expertise might do little to help with implementation if there is no willingness on behalf of the political elite to take steps in that direction, but it might be helpful when the reasons for non-implementation have to do with lack of knowledge. An example of this is the assistance offered by Germany to the ANC delegation just before the start of the SA peace negotiations, which showed the delegates that what was important was not whether the state would be a federal or a unitary one, but how much power would rest at each level of government.<sup>477</sup> This resulted in the ANC conceding to a federal state and contributed to the successful outcome of the peace negotiations. Conversely,

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<sup>476</sup> AP-953/05 (08 July 2006, BiH CC). For the High Representative’s response, see Office of the High Representative, ‘Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05’, (Sarajevo: Office of the High Representative, 23 March 2007), on [http://www.ohr.int/decisions/statemattersdec/default.asp?content\\_id=39397](http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=39397) [accessed 10 June 2014]. The word ‘overruling’ in the main text is in inverted commas because technically, the High Representative has no such authority over the Constitutional Court.

<sup>477</sup> Nelson Mandela, *Long Walk to Freedom* (London: Abacus, 1994) at 492.

however, the international community's offering of technical assistance to BiH in relation to *Sejdić's* implementation has not had any significant effect on peacebuilding attempts, thus emphasising once again the importance of having a peace-friendly political elite in the country.

A second strategy in dealing with the problem of political unwillingness to implement human rights decisions is for the judiciary to interpret its powers broadly and take a more active role in the enforcement of the judgment itself. This was the approach adopted by the BiH Constitutional Court in *U-44/01* where it held that the change of a number of towns' names in the Republika Srpska in a way that presented them as having an exclusively Serb identity was unconstitutional.<sup>478</sup> The Court gave the Republika Srpska National Assembly 3 months to bring the legislation into line with the Constitution, but the use of the veto in the legislature delayed the proceedings. Seven months later and with no amendment of the relevant law in sight, the Court made two further rulings.<sup>479</sup> First, noting that its previous decision remained unenforced, it invalidated the unconstitutional law and referred the matter to the state prosecutor for consideration. Second, it took the initiative to temporarily rename the towns itself (usually by reinstating the old names) until the new legislation came into effect. Soon after, the National Assembly agreed with all but one of the names assigned by the Court, and adopted an acceptable alternative in the last case. As a result, '[t]his novel remedy broke the legislative logjam [and showed that the judiciary] can usefully complement, as well as check, the work of legislatures.'<sup>480</sup>

Despite the success of this approach however, it should be acknowledged that it can only be used in exceptional circumstances where the implementation of the decision does not require a political judgement call. On the facts of this case, the most appropriate thing to do would be for the legislature to adopt the old names of the towns, which made the Court's decision to adopt this approach relatively uncontroversial. However, the scenario was considerably different in the case of *Matatiele*, where the decision of what province the municipality would become part of required balancing the wishes of its population with other factors, such as the

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<sup>478</sup> *U-44/01* (27 February 2004, BiH CC).

<sup>479</sup> *U-44/01 (No.2)* (22 September 2004, BiH CC).

<sup>480</sup> David Feldman, 'Renaming Cities in Bosnia and Herzegovina', *International Journal of Constitutional Law*, 3/4 (2005), 649 at 662.

economic well-being of the region as a whole. Greater judicial intervention in such a case would have been wrong and might have undermined rather than promoted peacebuilding attempts. Therefore, while greater judicial activism can be effective in dealing with political unwillingness to act, it is an approach that can only be used relatively rarely.

The final way to encourage the successful implementation of human rights decisions is to strengthen the civil society in the country so that it can push politicians to pass peace-promoting legislation or adopt a more reconciliatory stance towards the ‘other’. An example of such an attempt in Cyprus is an initiative taken by a group of (GC) human rights lawyers, known as ‘Truth Now’, to establish a bi-communal Truth Commission.<sup>481</sup> Presumably in an attempt to attract support from both Greek and Turkish Cypriots, ‘Truth Now’ places particular emphasis on documenting violations with regard to missing and disappeared persons, an emotive issue for both communities on the island. Other examples of the civil society’s efforts to promote peace in Cyprus include a series of events that took place in 2004, just before the Annan Plan referendums, especially in the non-ROC controlled part of Cyprus. A number of TC civil society organisations grouped together and planned demonstrations, street parties and petitions in favour of a ‘Yes’ vote in the referendum. Among the most inspiring moments during those tense months were joint demonstrations at the Green Line by Cypriots of all ethnicities in favour of peace. Since then, a number of small civil society organisations have continued their work in Cyprus by organising social events and bringing Greek and Turkish Cypriots together.<sup>482</sup>

Nevertheless, it is not the case that civil society organisations always and necessarily contribute to successful conflict management. To the contrary, they can sometimes make maximalist demands, polarise the public and undermine the peacebuilding process. This is again illustrated through the activities of some civil society organisations in Cyprus which either receive exclusively GC or exclusively TC

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<sup>481</sup> Official website of ‘Truth Now’, <http://www.truthnowcyprus.org/index.php/en/> [accessed 23 December 2014].

<sup>482</sup> A number of these civil society organisations are located in the UN buffer zone under the umbrella of the Home for Cooperation: <http://www.home4cooperation.info/> [accessed 3 May 2014].

support.<sup>483</sup> These bodies have over the years been organising events commemorating the suffering of their ethnic group's members (while ignoring similar experiences of the other side) and pushing for laws and a peace agreement that will fully safeguard their interests, even if the other ethnic group considers these unacceptable. For instance, GC displaced peoples' organisations have played a key role in interpreting *Loizidou* in a very specific – and largely misleading – light, which in turn has discouraged GC to accept a solution that does not fully safeguard restitution of their properties. It is noteworthy that even 'Truth Now', which argues for a bi-communal effort that will benefit both communities, is only composed of GC members. The mono-ethnic composition of 'Truth Now' or even the specific demands of displaced peoples' organisations are usually not consciously directed towards the fuelling of the conflict. They can nevertheless have this effect, thus suggesting that civil society organisations, like human rights, can both help and undermine peacebuilding efforts.<sup>484</sup> Yet, the presence of such a danger should not hinder attempts to strengthen civil society within post-conflict countries or automatically result in a 'defensive formalism' where only state institutions are trusted to participate in the peacebuilding process.<sup>485</sup> Rather, it should be used as a warning, especially to international peacebuilders who are not deeply familiar with the society in question, to be careful when distinguishing between civil society organisations that can help promote peace and others that can have the reverse effect.

Involving the international community and strengthening the judiciary and peace-friendly civil society organisations are useful strategies that can push for the implementation of human rights decisions. However, the extent to which each of these can be used to manage a specific conflict and the contribution they can make to the building of peace largely depend on the context of the ethnically divided society in question. For instance, while the active involvement of the judiciary in the Bosnian name-changing case had positive consequences in the country, a similar strategy would possibly be detrimental for peacebuilding in Cyprus where the courts do not generally enjoy the same level of trust and legitimacy among the population. This

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<sup>483</sup> Olga Demetriou and Ayla Gürel, 'Human Rights, Civil Society and Conflict in Cyprus', in Raffaele Marchetti and Nathalie Tocci (eds.), *Civil Society, Conflicts and the Politicization of Human Rights* (Tokyo, New York, Paris: UN University Press, 2011), 100.

<sup>484</sup> Ibid.

<sup>485</sup> Brian Gormally and Kieran McEvoy, 'Dealing with the Past in Northern Ireland 'from below': An evaluation' (Belfast: The Community Foundation for Northern Ireland, September 2009) at 12.

conclusion offers evidence against the liberal assumption that there is just one peacebuilding recipe, at the centre of which are human rights, that is appropriate and ‘correct’ in all ethnically divided, post-conflict societies. Rather, human rights only become effective when certain conditions – that may vary from society to society – have been satisfied. Such conditions include, first and foremost, a willingness among the political elite to promote peace in the country and the existence of legitimate judicial and political bodies to push this agenda forward. Focusing on these will often be as important for peace as the protection of human rights themselves.

## **6. Conclusion**

This chapter argued that the real test of whether human rights are successful peacebuilding tools stems, not from judicial pronouncements, but from the effect they actually have on the ground. This raised two questions: first, the extent to which human rights decisions are actually implemented in practice and second, whether their enforcement can always help manage the political conflict in question. A mixed outcome exists on both counts: in some situations the Court’s decision will be swiftly implemented in ways that have positive peacebuilding consequences, while in others the enforcement – if that takes place – might make no contribution or even have a negative effect on peace. Such negative consequences suggest that even laws that are human rights compatible do not always and necessarily promote peace; it might be the case that they technically protect the interests of individual applicants, but to the detriment, or while ignoring the needs, of the post-conflict society as a whole. Nevertheless, none of the negative scenarios identified in this chapter seem to have been appreciated by the international community, which by and large has assumed that a judicial decision respecting human rights automatically translates to a good implementation strategy with positive peacebuilding effects.

A failure to enforce human rights case law or the negative effects of a badly implemented decision are the results of a political elite that is unwilling to support the change in question and work towards peace. In the absence of such support, a number of alternative strategies can be tried, but their shortcomings in achieving the desirable result should be acknowledged. Ultimately, the political climate in the ethnically divided, post-conflict society is equally, if not more, important than the existence of

human rights institutions and judgments. With that in mind, questions are raised as to whether the international community should primarily be funding rule of law and institution-building programmes, or whether it should also turn its attention and resources to the conditions that will make these effective in the first place.

## **Chapter 7: What lies beneath the political conflict**

### **1. Introduction**

In the best-case scenarios, a divisive political conflict will be adjudicated in a Court of law, the human rights decision will be swiftly implemented and the legal and institutional changes that will result from this process will be able to contribute to the management of the conflict and the building of peace. Nevertheless, little attention has been paid to the type of changes that peace requires, the type of changes that the protection of human rights can induce and whether in fact, the two are the same. This discussion about the *type* of changes necessary for peace often remains unarticulated, which helps explain why the positive link between human rights and conflict management is so readily invoked, but never quite so readily explained. Arguably, the promotion of security, justice and reconciliation requires that holistic changes take place: legal, political, socio-economic and psychological changes are all equally important steps towards peace. However, as Section 2 argues, while human rights can result in amendments to the law, their implementation does not also contribute to other types of changes.

The ability of human rights to induce only certain types of changes necessary for conflict management suggests that they must be supplemented by other peacebuilding tools as well. Yet, the popularity of human rights (explained by their moral intuitive appeal and their perfect fit within the dominant liberal peacebuilding project) causes these alternative peacebuilding tools, important as they might be, to often be overlooked. This is problematic because disregarding socio-economic, political or psychological changes due to an overemphasis on legal amendments can backfire and have detrimental consequences for peace. As Hamilton and Buyse put it in the context of political transitions more generally, '[t]he transitional jurisprudence of international human rights institutions is one among a myriad factors affecting transitions'.<sup>486</sup> Among the other myriad factors that can contribute to this transition are peacebuilding strategies that influence the perceptions of people in post-conflict

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<sup>486</sup> Antoine Buyse and Michael Hamilton, 'Conclusions', in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge: CUP, 2011), 286 at 293.

societies, rather than just amend the laws and institutions. Some of these strategies have a top-down effect, while others engage with the grassroots in an attempt to promote change from below. All of them however, are connected by the fact that the change they induce is not the result of an amended legislation or the work of a lawyer. Examples of these alternative strategies and their contributions to peace are discussed in more detail in Section 3.

## **2. Legal, political, socio-economic and psychological changes for peace**

Protecting human rights is an important first step for the building of peace since their implementation can result in necessary changes to the law and the relevant institutions. However, because the law does not operate in a vacuum, such legal amendments should take place together with broader socio-economic and political changes as well. For instance, while the right to property was successfully implemented in both Bosnia and Herzegovina (BiH) and South Africa (SA), the restitution programmes it gave rise to resulted in detrimental consequences for peace, not because the law itself was problematic, but due to non-legal factors that prevented victims from feeling truly remedied. Justice was ultimately not done because the continuing inter-ethnic discrimination and socio-economic differences in the two countries made the provision of a remedy largely illusory. Similarly, the legal changes introduced by protecting the right to vote, necessary as they might be for peacebuilding, are insufficient unless they are accompanied by more extensive political changes. If they are not, the law will continue to operate within a flawed political system and will perpetuate feelings of injustice on the ground. Due to the interconnectedness of the elements of peace, such disappointing outcomes in terms of justice are likely to have detrimental consequences for security and reconciliation as well.

### **(a) The right to property**

The right to property has been almost perfectly implemented in BiH: despite their large numbers, displaced people have received restitution, the international



community's preferred remedy, in a relatively short period of time.<sup>487</sup> The Property Law Implementation Programme (PLIP) amended previous discriminatory laws and procedures and improved the institutions responsible for processing the claims. As a result of these legal changes, 4 years after PLIP's inception, 93% of the displaced applicants in the country had been remedied.<sup>488</sup> Nevertheless, PLIP's statistical success has not been translated in the physical return of the victims: although it is unclear how many displaced people who regained their properties returned to live in them, anecdotal evidence is disappointing.<sup>489</sup> For instance in the Republika Srpska, only 20-30% of those to whom property was returned actually live there.<sup>490</sup> Most people obtained their property titles and then sold them so that they could buy a house in areas where they were in the majority. An explanation for this lies not in the deficiencies of the property law, but in an inability to see beyond it. Sustainable refugee return requires socio-economic and psychological changes on the ground, which the implementation of the right to property cannot induce on its own.

In order for victims to feel that justice has been done, the remedy they receive must be meaningful; in the case of BiH, the return of the displaced population to their houses should have been a real option that people could use if they wished to. Important factors influencing the possibility of return in addition to making it legally possible, include the extent to which the social climate in the area of return is welcoming and whether the applicants have the economic resources for this move. In BiH the disproportionate emphasis on the law to the detriment of these additional factors often made the option to return merely imaginary. Especially in the early days after Dayton, there was an endemic problem of discrimination in all areas of life: a minority returnee found it difficult, if not impossible, to get a job, be served without discrimination by public officials and socialise with the majority of the community,

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<sup>487</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons', (Geneva: United Nations, 11 August 2005) at [2.2].

<sup>488</sup> Office of the High Representative, 'Statistics: Implementation of the Property Laws in Bosnia and Herzegovina', (Sarajevo: Office of the High Representative, 31 May 2000), on <http://www.ohr.int/plip/pdf/PLIP5.00.PDF> [accessed 10 June 2014].

<sup>489</sup> International Crisis Group, 'The Continuing Challenge of Refugee Return in Bosnia & Herzegovina', (Sarajevo: International Crisis Group, 2002) at 11.

<sup>490</sup> European Commission against Racism and Intolerance, 'First Report on Bosnia and Herzegovina', (Strasbourg: Council of Europe, 25 June 2004) at [22].

which was of a different ethnic group.<sup>491</sup> Legal access to property was not the only, or even the main barrier to return, something confirmed by the fact that 20% of Bosnians who were unwilling to return to their houses would reconsider their decision if the job market improved.<sup>492</sup> This raises questions as to whether displaced people who sold their returned properties and moved to areas where they were in the majority did so voluntarily, or because they lacked the socio-economic support to remain there. However, if the low number of returnees is due to socio-economic difficulties to resettle rather than a voluntary decision on their behalf, it is unlikely that they felt that justice had truly been done.

In theory the importance of socio-economic factors to the return of refugees was acknowledged by the international community, which stated just before closing down PLIP that:

'While property law implementation is the fundamental first step, it is only one among many of the elements underpinning sustainable return. *Full implementation of Annex VII means that not only can people return to their homes but that they can do so safely with equal expectations of employment, education and social services.*'<sup>493</sup>

Nevertheless, despite appreciating the limitations of a purely legal solution to the problem of forced displacement, no other approach was seriously adopted to supplement it. The emphasis that was put on the legal protection of the right dwarfed any attention to issues of social justice, such as employment and decent education opportunities. As a result, in 2011, the unemployment rate in BiH was more than 40%<sup>494</sup> and in 2009, approximately 50% of the population in both entities lived below

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<sup>491</sup> Ibid., at [40]-[45].

<sup>492</sup> Commission for Real Property Claims of Displaced Persons and Refugees, 'Return, Local Integration and Property Rights in Bosnia Herzegovina', (Sarajevo: Commission for Real Property Claims of Displaced Persons and Refugees, 11 November 1999), on <http://www.refworld.org/docid/3d64e2dd2.html> [accessed 10 June 2014].

<sup>493</sup> Office of the High Representative, 'PLIP Press Release, Property Law Implementation Is Just One Element of Annex VII', (Sarajevo: Office of the High Representative, 27 February 2003), on [http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content\\_id=29347](http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=29347) [accessed 10 June 2014], (emphasis in the original).

<sup>494</sup> 'Index Mundi: Bosnia and Herzegovina Unemployment Rate', on [http://www.indexmundi.com/bosnia\\_and\\_herzegovina/unemployment\\_rate.html](http://www.indexmundi.com/bosnia_and_herzegovina/unemployment_rate.html) [accessed 3 June 2014].

the poverty line or was at risk of falling below it at any time.<sup>495</sup> Minority returnees still find it harder than the rest of the population to get a job.<sup>496</sup> The overwhelming importance attributed to the law led peacebuilders to ignore the basic truths that restitution is not the same as return, that the right does not in itself guarantee justice and that '[r]ecognition of title in a vacuum, where the conditions for return do not exist, will at best result in a mass sell-off of property.'<sup>497</sup> Thus, while justice was originally promoted through the legal changes that took place as a result of the right's implementation, this was a pyrrhic victory, since it was ultimately undermined by the returnees' inability to restart their lives and their subsequent decisions to sell.

The excessive emphasis on the legal nature of the right to property has not only undermined feelings of justice, but also reconciliation. Even in cases where people did return permanently to their old houses, this resulted in some co-existence and interaction between ethnic groups, but no genuine improvement in inter-ethnic relations. This is because while the right to property can induce legal and institutional change, it is ill suited in bringing about the psychological adjustments that are necessary for reconciliation. Among such psychological adjustments is the idea that the other might have been a victim as well as a perpetrator and that his actions – reprehensible as they might be – could have been motivated by fear rather than hatred. Stefansson makes this point through his analysis of the 'big' and the 'small home'.<sup>498</sup> The right to property can successfully protect the latter – the return to the actual structure – but legal changes cannot on their own promote the former – the feeling of a shared community between the ethnic groups. Indicative is Stefansson's example of minority returnees of Muslim origin, who avoid wearing green, a colour associated with their religion, in public places so that they do not provoke reactions.<sup>499</sup> The implementation of property rights and overemphasis on legal changes happened to the detriment of other peacebuilding tools that could have more effectively induced

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<sup>495</sup> Huma Haider, '(Re)Imagining Coexistence: Striving for Sustainable Return, Reintegration and Reconciliation in Bosnia and Herzegovina', *International Journal of Transitional Justice*, 3/1 (2009), 91 at 97.

<sup>496</sup> European Commission against Racism and Intolerance, 'Second Report on Bosnia and Herzegovina', (Strasbourg: Council of Europe, 7 December 2010) at [40].

<sup>497</sup> Charles Philpott, 'Though the Dog Is Dead, the Pig Must Be Killed: Finishing with Property Restitution to Bosnia Herzegovina's IDPs and Refugees', *Journal of Refugee Studies*, 18 (2005), 1 at 21.

<sup>498</sup> Anders H. Stefansson, 'Homes in the Making: Property Restitution, Refugee Return and Senses of Belonging in a Post-War Bosnian Town', *International Migration*, 44/3 (2006), 115.

<sup>499</sup> Ibid.

positive psychological changes. As a result, people from different ethnic groups live parallel lives side by side, but they do not interact meaningfully; this might be an improvement from being actively hostile to the other, but it is a far cry from having achieved reconciliation or peace more generally.

The inability of the institutions in charge of the right to property to result in peace-inducing socio-economic and psychological changes is also apparent in SA. The Restitution of Land Rights Act [No. 22 of 1994] created the legal framework that allowed the Commission on Restitution of Land Rights (CRLR) to provide restitution, compensation or exchange to displaced victims of apartheid. In practice, compensation has been most popular among those who lost land in the cities and restitution among communities that were displaced from the countryside. The implementation process of the right to property has not been as effective in SA as it was in BiH; it has been both slower and more expensive. Twenty years after the passing of the Act, some applicants have still not received their remedy, while the cost of the whole programme is estimated as exceeding R20 billion.<sup>500</sup> However, it is not these characteristics of the programme that undermined its peacebuilding prospects the most. Rather, the failure of the restitution programme rests on the CRLR's assumption that apartheid land law is a legal evil that could be unlegislated and that restitution was about the reversal of a set of unjust transfers rather than the need to redress the deeper social and psychological impacts of displacement.<sup>501</sup> This assumption discouraged and delayed the CRLR from adopting peacebuilding tools other than those providing a legal remedy; in turn, the non-adoption of a more holistic peacebuilding programme failed to induce the necessary socio-economic and psychological changes.

The CRLR's approach in relation to restitution has been that the implementation of the law and the property's return to the displaced victims mark the end, rather than the beginning, of the State's efforts to promote justice. However, this overemphasis on the law and lack of practical post-restitution support has left displaced communities,

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<sup>500</sup> Ruth Hall, 'Reconciling the Past, Present and Future: The Parameters and Practices of Land Restitution in South Africa', in Cheryl Walker et al. (eds.), *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Athens: Ohio University Press, 2010), 17.

<sup>501</sup> Theunis Roux, 'Land Restitution and Reconciliation in South Africa', in Francois Du Bois and Antje Du Bois-Pedain (eds.), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge: CUP, 2008), 144.

which have returned to their lands with often no rural life experience, on their own and in competition with commercial farmers. The end result has often been the dismantling of successful farming enterprises – and the consequent losing of jobs – in order to replace them with the inexperienced running of the properties and barren fields. Confirming this is a 2006 study in which the majority of the 179 projects examined were dysfunctional in that little, if any, production was being pursued.<sup>502</sup> In a belated attempt to deal with these shortcomings, the government started making restitution conditional on the existence of strategic partnerships between the displaced community and commercial farmers.<sup>503</sup> These agreements, usually lasting for 10-15 years, are expected to provide some farming and management experience for the community members so that they can eventually run their property on their own. However, privatising the State's responsibility to provide post-settlement support has often been problematic since the interests of the displaced community are not always aligned with those of the commercial farmers.<sup>504</sup> For example, in an attempt to maximise yield, the agreements prevent communities from residing on the restituted land or growing crops for their own personal use; as a result, community members become landlords of large estates on paper and remain homeless and destitute in practice. It is also often the case that they do not benefit from the enterprise's profits since the commercial farmer might decide that it is best to reinvest all of them.

The limitations of the CRLR's excessively legalistic approach have also become apparent in relation to the remedy of compensation. For instance, claimants have raised questions about what the standardised compensation amount they were paid signifies, since it clearly does not reflect the value of their property.<sup>505</sup> This has been a particular point of contention in cases where by paying the uniform amount, the CRLR ignored distinctions that were important in the eyes of the claimants, such as

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<sup>502</sup> Community Agency for Social Enquiry, 'Assessment of the Status Quo of Settled Land Restitution Claims with a Developmental Component Nationally', (Pretoria: Department of Land Affairs, 2006).

<sup>503</sup> Interestingly, the use of strategic partnerships suggests that the CRLR and the SA government, like the international community in BiH, were reluctant to get involved in post-restitution support projects even after their necessity became abundantly clear.

<sup>504</sup> Bill Derman, Edward Lahiff and Espen Sjaastad, 'Strategic Questions About Strategic Partners', in Cheryl Walker et al. (eds.), *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Athens: Ohio University Press, 2010), 306; Edward Lahiff, 'State, Market or Worst of Both? Experimenting with Market-Based Land Reform in South Africa', *Programme for Land and Agrarian Studies: University of the Western Cape, Occasional Paper No. 30*, (2007).

<sup>505</sup> Anna Bohlin, 'A Price on the Past: Cash Compensation in South African Land Restitution', *Canadian Journal of African Studies*, 38/3 (2004), 672.

the fact that some of them had received alternative accommodation at the time of the displacement, while others had not. This failure to take into account the context in which the legal remedy operates has not only undermined feelings of personal justice among the victims, but also social justice more generally. Several families, whose members have multiplied since their dispossession 50 or 100 years ago, might have been occupying a single property. When the compensation award has been shared between them, there is often very little money left to make any difference in people's lives. Interviews with victims suggest that the compensation amount, especially when this was minimal, was usually used to buy everyday supplies or pay off debts rather than in a way that could make a long-term difference in people's welfare.<sup>506</sup> Thus, technically protecting property rights while leaving socio-economic conditions unchanged failed to promote feelings of justice among the displaced population.

However, perhaps the biggest failure of the compensation remedy lies, not with its disappointing effects in relation to justice, but in relation to reconciliation. In theory, compensation promotes reconciliation by providing a feeling of closure to the victims, who can leave the past behind them and start looking towards a common future with their former enemies. In order for this to happen however, it is necessary to, not only compensate them, but also explain to the victims why compensation was paid. Problematically, this never happened in SA, where some of the displaced people did not even understand why they received money in the first place. They perceived the compensation as another piece of financial help from the haves (including the State) to the have-nots, rather than as a unique payment reflecting an acknowledgment of the injustices they had suffered.<sup>507</sup> However, if they did not understand the purpose of the compensation, the remedy is unlikely to have helped them feel reconciled. The failure to convey the symbolic significance of the monetary award to the victims arguably stems from a misunderstanding of what the right to property can achieve: while it can result in legal amendments that make the payment of compensation possible, it cannot on its own produce the psychological changes that are necessary for reconciliation.

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<sup>506</sup> Bernadette Atuahene, 'Paying for the Past: Redressing the Legacy of Land Dispossession in South Africa', *Law and Society Review*, 45/4 (2011), 955.

<sup>507</sup> Bohlin, 'A Price on the Past: Cash Compensation in South African Land Restitution'.

Moreover, this overly legalistic response to the problem has not only prevented the victims from feeling reconciled, but has arguably had similar consequences for the perpetrators. The lack of an apology that should have accompanied the compensation awards has allowed most of those who benefited from the displacement to go on with their lives and pretend that the geography and distribution of resources in the country are unrelated to its apartheid past. Evidence suggests that to the extent that land restitution is discussed among white South Africans, debates tend to focus on how much compensation has been paid and whether the displaced people have used that money wisely, rather than on what the remedy reflects.<sup>508</sup> Consequently, ‘land issues are terribly important to black South Africans, and they are practically invisible to white South Africans’,<sup>509</sup> with 77% of the former considering apartheid to be a factor that has influenced land inequality and only 34% of the latter agreeing.<sup>510</sup> Perhaps most problematic in terms of reconciliation, is the fact that there is still a lingering perception among some that economic inequalities are better explained by the laziness of the majority, rather than the history of the country.<sup>511</sup> It is only through peacebuilding tools that affect people’s personal beliefs, rather than legal status, that attitudes such as these can be abandoned.

The interconnectedness between the three elements of peace explains why the restitution programme’s inability to promote justice and reconciliation has also had negative consequences for security. The legal changes brought about by the Restitution Act, which remedied the victims in a relatively organised and legally sanctioned process, promoted security in the short-term because they prevented the opportunistic and often violent, mass ad-hoc taking of properties that had been witnessed in neighbouring Zimbabwe. Nevertheless, if people are dissatisfied with the current state of affairs even after they have been promised change, and especially when they have used violence in the past to address similar problems, they are likely to revert back to their old tactics.<sup>512</sup> The continuing socio-economic chasm between the racial groups in the country perpetuated feelings of injustice among the victims;

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<sup>508</sup> Ibid.

<sup>509</sup> James L. Gibson, *Overcoming Historical Injustices: Land Reconciliation in South Africa* (Cambridge: CUP, 2009) at 84.

<sup>510</sup> Ibid., at 46.

<sup>511</sup> Ibid.

<sup>512</sup> Connie Peck, *Sustainable Peace: The Role of the UN and Regional Organizations in Preventing Conflict* (Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers, 1998).

this, coupled with the inability of the restitution programme to reconcile the population are factors that undoubtedly contributed to the soaring crime levels in the country, and in particular the occurrence of farm attacks.<sup>513</sup>

Farm attacks do not constitute a single crime, but they are the manifestation of housebreaking and robbery in big farms, sometimes accompanied by murder and/or rape of the residents. Whites are overrepresented in these attacks, making up 62% of the victims, while almost exclusively perpetrators are black.<sup>514</sup> While most of these attacks can be explained as 'easy robberies', the government has been unable to exclude the possibility of racist motivations or the attackers' actions being justified by beliefs that they were 'making things right'.<sup>515</sup> Other factors that could explain this phenomenon and high crime rates more generally include the ineffectiveness of the criminal justice system and the fact that the struggle against apartheid has made violent dispute resolution more acceptable.<sup>516</sup> Moreover, the rapid urbanisation of the country has resulted in overcrowding and unemployment and has made the differences between the 'haves' and the 'have-nots' more obvious.<sup>517</sup> These problems could have been alleviated through a more successful restitution programme: had it dealt with social justice more effectively, there would have been a smaller divide among rich and poor SA and had it paid more attention to reconciliation, violence could have been a less common way of resolving disputes. The claim here is not that the failure of the land restitution programme is the only explanation for long-term insecurity in the country; however, its overemphasis on legal, to the detriment of socio-economic and psychological, changes necessary for peace could offer a partial explanation.

A number of factors can explain the disappointing peacebuilding effects of the SA restitution process: limited resources, the huge number of victims and evidentiary difficulties arising from the passage of time. Similarly, the uncooperativeness of

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<sup>513</sup> SA is generally a violent country. As an indication, there were 30.9 homicides per 100,000 people in SA in 2011, as compared to 1.0 in the UK and 4.7 in the United States. (United Nations Office on Drugs and Crime, 'UNODC Homicide Statistics', (2013), on <http://www.unodc.org/unodc/en/data-and-analysis/homicide.html> [accessed 10 June 2014].)

<sup>514</sup> South African Committee of Inquiry, 'Report of the Committee of Inquiry into Farm Attacks', (Pretoria: Government of South Africa, 31 July 2003) at Ch. 2.

<sup>515</sup> *Ibid.*, at 411.

<sup>516</sup> *Ibid.*, at 298-9.

<sup>517</sup> *Ibid.*, at 302.



political elites and the vast destruction caused by the war also made the completion of the restitution programme more difficult in BiH. However, in both cases responsibility for failure to promote each of the three elements of peace lies mainly in the perception of the forced displacement problem, and its solution, as merely being the concerns of the law. This absence of ‘legal humility’ resulted in an overemphasis on the protection of the right to property, which in turn, shifted attention away from other peacebuilding strategies that could have resulted in a more holistic management of the conflict in question by also addressing the socio-economic and psychological grievances that are associated with forced displacement.<sup>518</sup>

### **(b) The right to vote**

Like the right to property, which operates within a broader context, the right to vote only becomes meaningful if it is implemented alongside political and psychological changes. If the right is exercised within a problematic political framework, or if the voters themselves are unwilling to work towards peace, then participating in democratic elections will not have the peacebuilding consequences that the international community expects. To the contrary, it is likely that the protection of the right to vote will perpetuate the conflicts and political pathologies that divide the society in the first place. This is illustrated through examples from all three case studies, which suggest that changing the law – irrespective of the legislative amendment’s content or the reformed institution’s structure – is only one part of the peacebuilding process. As the UN *Declaration on a Culture of Peace* put it, in addition to new laws and processes, peace also consists of ‘a set of values, attitudes, traditions and modes of behaviour and ways of life’.<sup>519</sup> It is important to acknowledge that while the right to vote can promote the former, it can do very little in relation to the latter.

In Cyprus, *Aziz*’s swift implementation resulted in positive amendments to the electoral law, but merely protecting the right to vote could not in itself induce the changes to the country’s political culture that were also necessary for peace. This has

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<sup>518</sup> Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’, *Journal of Law & Society*, 34(4) (2007), 411 at 425.

<sup>519</sup> United Nations General Assembly Resolution (UNGAR) 53/234A *Declaration on a Culture of Peace* (13 September 1999), Article 1.

resulted in a success of liberal peacebuilding on paper, but a failure in terms of affecting the lives of the people on the ground. Thus, although Turkish Cypriots (TC) can technically participate in the Republic of Cyprus (ROC) elections, all political debates take place in Greek and continue remaining untranslated, thus preventing potential TC politicians and voters from being meaningfully involved in the political process. Moreover, while TC representatives can in principle be elected as MPs and municipal councillors, other public positions, such as Ministers and high-ranking technocrats, remain unavailable to them.<sup>520</sup> Even more worryingly, approximately 30,000 TC who intended to vote in the 2014 European Parliament elections were prevented from doing so because of last minute bureaucratic changes to the law.<sup>521</sup> As a result, TC residing in the ROC might technically be considered as equal citizens to Greek Cypriots (GC), but the political arena in which they are called to participate sends a different message and continues making their empowerment almost impossible to achieve in practice. It is therefore unsurprising that although TC residing in the ROC-controlled areas have been exercising their right to vote since 2006, so far no TC representative has been elected to office.

Equally problematic has been the fact that *Aziz*'s implementation was not supplemented by a public discussion about the broader implications of the case, which in turn failed to challenge the mentality of the people in any way. A number of key assumptions that gave rise to the right's violation still remain unarticulated, thus perpetuating decades-old prejudices that undermine peace. For example, the GC public's apathy to the disenfranchisement of TC in the ROC for the last half-century reflects most people's beliefs about the status of TC more generally. Considering that the right to vote is the badge of citizenship, *Aziz* should have been used to send the message that GC are not the only 'true' citizens of the Republic. The TC living in the government-controlled areas are a symbolically important counter-example to the nationalistic rhetoric that presents TC as enemies of the ROC and undermines reconciliation between the two communities. Only through such discussions could

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<sup>520</sup> Under the Constitution of the Republic of Cyprus, signed on 16 August 1960, certain ministerial posts and high-ranking positions in the civil service, such as the Vice Governor of the Central Bank, were reserved for Turkish Cypriots. These posts have remained vacant since 1963 when all TC abandoned their positions in the civil service and *Aziz*'s implementation has done (and could do) nothing to change this.

<sup>521</sup> Angelos Anastasiou, 'Some 30,000 Turkish Cypriots Will Not Be Able to Vote', *Cyprus Mail*, 24 May 2014.

citizens start thinking about the ethnic identities of different groups and potentially challenge the dominant narrative that portrays them as being in complete antithesis to each other. Yet, the top-down and legalistic amendments that took place in Cyprus were simply not up to the task of contributing to such a deeper and more fundamentally needed psychological change.

Simply enforcing the right to vote is also unlikely to contribute to peace in BiH, a fact that does not seem to have been appreciated by peacebuilders in practice. The international community has persistently been pushing towards *Sejdić*'s implementation, without acknowledging that the disenfranchisement of 'Others' is a consequence of a series of much more important and worrisome political pathologies in the country. Some of these pathologies can be at least partly addressed through legal amendments of the Constitution, which nevertheless have to go well beyond what *Sejdić* requires. Currently there is no, or very little, alternative for Bosnians (whether members of the Constituent Peoples or Others) who want to vote for a non-nationalist party. Politicians are constitutionally required to identify themselves along ethnic lines, which makes it unlikely that other ethnic group members will vote for them. Also, reserved seats for the representatives of each constituent people remove incentives from them to adopt moderate or non-nationalist strategies because they know they do not have to attract votes from members of other ethnic groups. The Bosnian consociational structure results in a government that is grossly inefficient in promoting its citizens' interests on the one hand, and a citizenry that is increasingly disempowered to do something about it on the other. A first step towards the promotion of peace in BiH therefore, is the adoption of extensive constitutional amendments, which should deal with the much broader political pathologies that divide the country, rather than just the disenfranchisement of Others.

However, even constitutional amendments that go well beyond *Sejdić*'s implementation are unable to exhaustively deal with all the political pathologies that are undermining peace in BiH. Among these pathologies is the rampant nationalist rhetoric in everyday politics,<sup>522</sup> the absence of political inter-ethnic cooperation, the lack of political accountability and trust from the electorate (also due to soaring

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<sup>522</sup> See for example, Elvira M. Jukic, 'Bosnian Serb Chief Says Country Should Split', *Balkan Insight*, 20 November 2013.

corruption levels), increased electoral apathy and the overuse of the veto power.<sup>523</sup> These pathologies can only be dealt with through major political and psychological changes among the electorate and politicians, not the law. Yet, this dimension of the problem has remained completely unaddressed during the negotiations for *Sejdić*'s implementation. Instead of portraying the negotiations as a necessary, but only first step towards peace, Bosnian political elites have presented them as a painful rite of passage into the European club; a change they have to endorse because they have been told to, not because it is beneficial for the country as a whole.<sup>524</sup> As a result, *Sejdić* has become a scaremongering device rather than a vehicle towards serious dialogue and reflection about the desirability of uncooperative and nationalist attitudes.<sup>525</sup> Thus, despite the far-reaching effects that legal amendments can have, they cannot replace political maturity; in fact, too much attention on how to change the law can distract from the real question of how to change the attitudes of the law-makers in the first place. Importantly, the critique here is not against specific legislative amendments that could be made in BiH, but against the use of the law as the main peacebuilding tool more broadly.

SA's political pathologies, which are quite different from those in BiH and Cyprus, must also be dealt with through mainly political and psychological changes rather than amendments to the law. The root of these pathologies lies in the fact that the country has been run by the African National Congress (ANC) since 1994, a trend that shows no signs of receding.<sup>526</sup> The ANC's legislative popularity has given it a comfortable majority in Parliament, thus allowing it to pass legislation without consulting or negotiating with any other party, and bringing it close to the 75% required for Constitutional amendments.<sup>527</sup> SA's status as a dominant party democracy over the last two decades has resulted in the fragmentation of opposition

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<sup>523</sup> For a general discussion of these political pathologies in BiH, see Asim Mujkic, 'We, the Citizens of Ethnopolis', *Constellations*, 14 (2007), 112.

<sup>524</sup> Even a cursory reading of the Bosnian press shows that the concern seems to be a lack of compliance with Europe's demands, rather than the improvement of the democratic structures themselves. See, for instance, Elvira M. Jukic, 'EU Censures Bosnia for Missing Reform Deadline', *Balkan Insight*, 4 September 2012; Elvira M. Jukic, 'EU 'Losing Patience with Bosnia', Official Says', *Balkan Insight*, 4 February 2013.

<sup>525</sup> Rfe Tanjug, 'Bosnian Serb Leader Blamed for Fomenting Crisis', *Balkan Insight*, 20 October 2011.

<sup>526</sup> The ANC received 62.1% of the votes in 2014, 69.9% in 2009, 69.69% in 2004, 66.35% in 1999 and 62.65% in 1994. (Electoral Commission of South Africa, 'National and Provincial Elections Reports' on <http://www.elections.org.za/content/About-Us/IEC-Annual-Reports/> [accessed 3 June 2014].)

<sup>527</sup> Constitution of the Republic of South Africa [No. 108 of 1996], Section 74.

parties, thus leaving them unable to offer a viable political alternative, has promoted the centralisation of power and led to ANC control of what should have been independent institutions.<sup>528</sup> Moreover, there has been a continuous distortion of 'where real politics happen' by shifting power from the parliamentary to the non-parliamentary, and therefore not politically accountable, wings of the dominant political party.<sup>529</sup> An illustration of the problem is the fact that while ANC MPs are allotted most of the question time in the National Assembly, they rarely take advantage of it, and are in fact prohibited by their party's code of conduct from using parliamentary structures to undermine party policy.<sup>530</sup>

Permanently dominant parties are detrimental to peace, especially in a country such as SA where violent uprisings occurred precisely due to the inability of the majority of the population to express its political convictions. On the one hand, they can undermine justice since they prevent, not only marginalised groups, but also the masses at large from challenging and meaningfully disagreeing with unpopular policies and decisions. An example of such a policy is Black Economic Empowerment (BEE), which has been adopted by the ANC in order to eliminate the economic divisions between racial groups in the country. BEE has been the source of numerous provocative corruption scandals, for which no one has apologised or been punished, and its abuse by a small number of party insiders has left the vast majority of black people deriving no benefit whatsoever.<sup>531</sup> However, despite its detrimental effects on justice and consequent unpopularity with the masses, BEE's close alliance with the interests of the ANC suggests that it is here to stay. Even more problematically, the inability of the people to effectively challenge an unpopular decision through the ballot box, could lead to citizen frustration and undermine security in the country. This danger materialised in 2012-13 when, fuelled by unmet demands for wage increases by state-run companies, several coal miners' strikes turned violent. The strikes resulted in the SA police force opening fire against the

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<sup>528</sup> Sujit Choudhry, 'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy', *Constitutional Court Review* 2 (2009), 1.

<sup>529</sup> *Ibid.*, at 30.

<sup>530</sup> Tom Lodge, 'The ANC and the Development of Party Politics in Modern South Africa', *Journal of Modern African Studies*, 42 (2004), 189 at 209.

<sup>531</sup> Roger Tangri and Roger Southall, 'The Politics of Black Economic Empowerment in South Africa', *Journal of Southern African Studies*, 34 (2008), 699; Okechukwu Iheduru, 'Black Economic Power and Nation-Building in Post-Apartheid South Africa', *Journal of Modern African Studies*, 42/1 (2004), 10.

protesters and killing, on one occasion, 46 people,<sup>532</sup> while the government openly entertained the possibility of deploying a 'peacekeeping force' to increase security levels in the area.<sup>533</sup> Finally, a country where feelings of justice and security run so low is unlikely to benefit from a willingness to cooperate between politicians and the public, which in turn undermines reconciliation.

Despite the obvious need to deal with political pathologies stemming from the ANC's dominance due to their detrimental consequences for peace, implementing the right to vote serves little purpose in this respect. The right is concerned with empowering individuals to make political choices, not with whether the outcome of such choices is beneficial or desirable to the country as a whole. Acknowledging the inability of human rights to help deal with these political pathologies, Choudhry suggests a range of other legal doctrines and presumptions that could restrict the ANC's dominance.<sup>534</sup> For example, the Court could use the 'non-usurpation doctrine' in order to invalidate decisions that have been taken by dictation from the non-parliamentary to the parliamentary wing of the party. While however, such strategies might legally restrict the ANC from acting in specific ways, they cannot really affect the people's political beliefs, which allow for the existence of a dominant party in the first place. Like with the political pathologies in Cyprus and BiH, the most appropriate solution to the continued dominance of the ANC is not the judicialisation of politics, but engaging with the grassroots: the public should be educated and informed about the advantages of having a properly functioning democracy rather than a system with democratic trappings and oligarchic mentalities. In order for such political and psychological changes to take place however, peacebuilders must also adopt a range of non-law related strategies that focus on the people themselves rather than the institutions.

### **3. Complementing human rights with alternative peacebuilding tools**

Two broad distinctions can be made in relation to the tools and strategies that are currently available to peacebuilders around the world. The first separates those that

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<sup>532</sup> David Smith, 'Marikana Mine Shootings Revive Bitter Days of Soweto and Sharpeville', *The Guardian*, 7 September 2012.

<sup>533</sup> David Smith, 'South African Mining in Deep Crisis as ANC Considers Peacekeeping Force', *The Guardian*, 4 June 2013.

<sup>534</sup> Choudhry, 'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy'.

directly affect the people on the ground (people-centred) from those that shape laws and institutions and expect these changes to trickle down to the masses (institution-focused). Human rights protection, with its emphasis on protecting fundamental legal interests and inducing legal amendments, falls squarely in the second category. However, as the examples from the previous section suggest, such institution-focused peacebuilding strategies, while valuable in their own right, cannot produce the broad political, socio-economic and psychological changes that are also necessary for peace. Therefore, a holistic peacebuilding recipe, that people on the ground and not just outsider observers consider a success, requires that institution-focused tools, such as human rights, be supplemented by people-centred mechanisms as well. These people-centred mechanisms can either be imposed from the top-down or promoted from the grassroots up. Each of these approaches has its own strengths and both should be used in order to induce as broad and sustainable changes to the divided society as possible.

References to a ‘holistic peacebuilding recipe’ and ‘people-centred mechanisms’ can justifiably raise the question: how different are these suggestions from Galtung’s, which have already been rejected as being too broad? Are peacebuilding strategies doomed to oscillate between the minimalist – and inadequate – liberal model and its maximalist – yet practically unachievable – alternatives? Arguably, while this danger is a real one, it remains possible to navigate between the two choices. On the one hand, implementing only legal and institutional changes is going to be easier than adopting a more holistic peacebuilding recipe. Different people-centred strategies might affect some people but not others, could be more effective in this divided society but not the next, or possibly only contribute during a particular period of time in the management of the conflict. Their greatest disadvantage in terms of attracting support and being adopted in practice is that they cannot be summed up in two or three catchphrases or laid out in a linear, easy-to-follow road map. Yet, the fact that they are more difficult to achieve – or even describe – does not deduct from their usefulness as peacebuilding strategies. Moreover, although they have more uncertain and long-term consequences than the liberal peacebuilding model, their objective to strike a balance between security, justice and reconciliation remains more feasible than Galtung’s positive peace. This section provides examples, rather than an exhaustive list, of different people-centred strategies used in the three case studies in order to elucidate what is meant by the term.

Top-down people-centred peacebuilding strategies have been suggested in the case of Cyprus under the heading of confidence-building measures. For instance, the two communities have, for years now, toyed with the idea that the town of Varosha, which used to be at the heart of the Cypriot tourism industry before 1974 but lies abandoned today on the north side of the Green Line, should be returned to its original inhabitants. Importantly, it has been suggested that this measure should precede the signing of a comprehensive peace agreement; its purpose should be to show the good will of the TC to reach an agreement.<sup>535</sup> In return, the ROC could allow that Ercan airport, the main airport in the non-ROC controlled areas which is currently only connected to Turkish airports, be opened to more destinations. Such confidence-building measures are not only likely to promote social and psychological change by presenting the other side as willing to give up something important in the negotiating process, but they can also contribute to the economic reinvigoration of the island: the rebuilding of Varosha will boost the economic crisis-struck building industry, while Ercan airport's opening will bring more tourists to the island. Yet, despite the obvious socio-economic advantages of adopting confidence-building measures like these, they remain to date, just hopeful plans.

Such top-down peacebuilding strategies could also be supplemented through grassroots initiatives that aim to promote change from the bottom-up. The theory behind this 'peace from below' strategy is that actually engaging with the people on the ground results in organic changes with more long-term beneficial effects for the divided society.<sup>536</sup> The United Nations High Commissioner for Refugees started such a bottom-up peacebuilding project in 2000 in BiH; its purpose was to provide practical and real-life incentives for cooperation between individuals of different ethnicities.<sup>537</sup> 'Imagine Co-existence' supported 26 projects which were jointly run by members of different ethnic groups and included setting up a café, running a

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<sup>535</sup> These confidence-building measures have recently been endorsed by the White House: US Office of the Press Secretary, 'Statement by the Press Secretary on Cyprus', (Washington: Government of USA, 11 February 2014), on <http://www.whitehouse.gov/the-press-office/2014/02/11/statement-press-secretary-cyprus> [accessed 3 June 14].

<sup>536</sup> Charles Thiessen, 'Emancipatory Peacebuilding: Critical Responses to (Neo)Liberal Trends', in Thomas Matyok, Jessica Senehi and Sean Byrne (eds.), *Critical Issues in Peace and Conflict Studies: Theory, Practice and Pedagogy* (Lanham: Lexington Books, 2011), 115.

<sup>537</sup> Haider, '(Re)Imagining Coexistence: Striving for Sustainable Return, Reintegration and Reconciliation in Bosnia and Herzegovina'.



journalist club and participating in a basketball team. The projects not only improved relations between the participants, but also countered nationalist rhetoric by showing to Bosnians that inter-ethnic reconciliation was possible. Moreover, they created settings in which people of different ethnicities could meaningfully interact with each other, at the same time as generating income for the participants. The programme's contribution in inducing economic change is reflected in the fact that of the 11 income-generating projects, 10 became self-sustainable and continued to operate even after funding dried out in 2002.<sup>538</sup>

Grassroots level reconciliation programmes have also been adopted in Cyprus, where participants have experienced similar positive effects. Among these programmes are a series of workshops, organised and funded by the Fulbright Commission, which are intended to bring Greek and Turkish Cypriot participants together and encourage them to discuss their experiences of the conflict.<sup>539</sup> During the workshops some participants were surprised to discover that the other side also suffered from casualties and refugees, thus helping them realise that they were not the only victims in the conflict.<sup>540</sup> Further, particularly before 2003 and the opening of the Green Line, the workshops presented the *only* opportunity for people to socialise with members of the other ethnic group. The experience was even more intense for the younger participants who were born after the segregation of the two communities in the 1960s and 1970s and therefore put a human face to the 'enemy' for the first time. Additionally to these workshops, the United Nations Development Programme (UNDP) has funded a number of reconciliation projects on the island, such as the establishment of the Cyprus Community Media Centre (CCMC) and the 'Engage' civil society umbrella organisation. The CCMC has so far helped over 25 civil society organisations to share untold stories of the conflict with the public and trained more than 100 people to make their own media across the island.<sup>541</sup> Moreover, 'Engage' has coordinated approximately 100 Greek and Turkish Cypriot civil society

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<sup>538</sup> Ibid., at 109.

<sup>539</sup> Tristan Roberts, 'Peace Camp Facilitates Reconciliation on Cyprus', (17 August 2004) on <http://wl.convio.net/site/News2?page=NewsArticle&id=5041> [accessed 10 June 2014].

<sup>540</sup> Harry Anastasiou, 'Communication across Conflict Lines: The Case of Ethnically Divided Cyprus', *Journal of Peace Research*, 39/5 (2002), 581.

<sup>541</sup> UNDP, 'UNDP Action for Cooperation & Trust in Cyprus: Multicommmedia', on [http://www.cy.undp.org/content/dam/cyprus/docs/ACT%20Publications/factsheet\\_ccmc\\_2013\\_Final.pdf](http://www.cy.undp.org/content/dam/cyprus/docs/ACT%20Publications/factsheet_ccmc_2013_Final.pdf) [accessed 3 June 2014].

organisations in signing public declarations of support to the two leaders for the ongoing peace negotiations.<sup>542</sup> It has also launched the first ever televised island-wide peace campaign and sought to increase public dialogue for a peace solution through a series of events around Cyprus.

However, although these projects and initiatives can make positive contributions to reconciliation, they have had very limited outreach effects in practice; the majority of Cypriots do not interact, let alone discuss or cooperate, with members of the other ethnic group at all. Thus, while cooperation programmes have taken place between the two communities, the general public has paid no significant attention to them. An example in point is the 1977 Nicosia Sewage Project, which has, quite literally, united the underground of the divided capital, but has generally not been spoken about. A more recent example is the success of the Committee of Missing Persons, a body of scientists from both communities who carry out excavations around the island in order to find missing persons from the 1963-64 and 1974 periods. Yet, despite the UN Secretary-General describing the Committee as ‘a model of successful cooperation between the Greek Cypriot and Turkish Cypriot communities’, its achievements are rarely discussed among the population or acknowledged in the popular press.<sup>543</sup> Thus, it is not only important that reconciliation strategies intended to induce psychological change are adopted, but also that they reach and engage with the people.

A body that was particularly successful in this respect was the Truth and Reconciliation Commission (TRC), which undertook the difficult, but necessary task, of helping South Africans ‘to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation’.<sup>544</sup> The TRC contributed to this objective not only through the final result of its efforts – a five volume account of the human rights violations that had taken place between 1960 and 1994 in the country – but also through the process that was used. Victims and perpetrators of human rights

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<sup>542</sup> UNDP, ‘UNDP Action for Cooperation & Trust in Cyprus: Engage – Civic Engagement for Reconciliation’, on [http://www.cy.undp.org/content/dam/cyprus/docs/ACT%20Publications/factsheet\\_engage\\_2012.pdf](http://www.cy.undp.org/content/dam/cyprus/docs/ACT%20Publications/factsheet_engage_2012.pdf) [accessed 3 June 2014].

<sup>543</sup> Committee on Missing Persons in Cyprus, ‘Committee on Missing Persons in Cyprus’, on <http://www.cy.undp.org/content/dam/cyprus/docs/PFF%20Publications/UNDP-CY-CMPLleaflet.pdf> [accessed 3 June 2014].

<sup>544</sup> Mr Dullah Omar, SA Minister of Justice, cited on the official Truth and Reconciliation website, <http://www.justice.gov.za/Trc/> [accessed 3 June 2014].

violations recounted their experiences either in writing or during public oral hearings with the expectation that making the truth known was necessary for reconciliation. Importantly, the need to engage with the public was appreciated from the start: all proceedings were broadcasted live on radio, while their launch and some high profile hearings were also televised. Moreover, the hearings took place in town halls, civic centres and churches around the country, thus giving the opportunity to the members of the public to take part in the Commission's proceedings. It is a matter of contention whether the TRC was indeed successful in promoting reconciliation in the country.<sup>545</sup> What is undisputed however, is that its methods of communicating with the South African population worked; its message might not always have been agreeable, but it was always heard.<sup>546</sup> This approach of the TRC is in sharp contrast to the workings of the CRLR, which although was charged with a similar mandate of providing 'support to the process of reconciliation and development', it perceived its role in a much more technical way.<sup>547</sup> As a result, the remedies the CRLR provided to displaced South Africans failed to result in the same psychological changes that the TRC had helped induce in the country.<sup>548</sup>

The TRC's success is that it brought out in the open the brutalities of the apartheid regime and has made it impossible 'for the average South African to suffer from selective amnesia' about the gross human rights violations that had taken place in the country.<sup>549</sup> Thus, while members of different ethnic groups consider the Commission more or less successful, they all agree that it helped bring out the truth.<sup>550</sup> This should

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<sup>545</sup> Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)', *Diacritics*, 32/3/4 (2002), 32; Rosemary Nagy, 'Reconciliation in Post-Commission South Africa: Thick and Thin Accounts of Solidarity' *Canadian Journal of Political Science* 35 (2002), 323.

<sup>546</sup> One example of the TRC's least popular conclusions was its finding that 'the ANC and its organs [...] committed gross violations of human rights in the course of their political activities and armed struggles, for which they are morally and politically accountable.' (Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report – Volume 5* (Pretoria: Government of SA, 1998) at [132].) The ANC's response to this was to – unsuccessfully – attempt to block the publication of the report. (Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa', *Human Rights Quarterly*, 25 (2003), 1088 at 1093).

<sup>547</sup> Department of Land Affairs, 'White Paper on South African Land Policy 1997', (Pretoria: Government of SA, 1997) at 14.

<sup>548</sup> Roux, 'Land Restitution and Reconciliation in South Africa'.

<sup>549</sup> Dorothy Shea, *The South African Truth Commission: The Politics of Reconciliation* (Washington: United States Institute of Peace, 2000) at 6.

<sup>550</sup> Jay A. Vora and Erica Vora, 'The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner and English South Africans', *Journal of Black Studies*, 34/3 (2004), 301 at 308-9.

be contrasted to the situation in the Balkans where the trials at the International Criminal Tribunal for the Former Yugoslavia (ICTY) have failed to eliminate the perpetuation of half-truths and myths about what happened during the conflicts. Indicative of this is the fact that although the Tribunal concerned itself extensively with the Srebrenica massacre, 25% of the Serbs polled had never heard about it, half of them believed the allegations were not true and 57% thought that even if they were true, they did not constitute war crimes.<sup>551</sup> However, while the South African TRC was undoubtedly much more successful in bringing out the truth than the ICTY, this did not always translate into a more reconciled population. Although some victims in SA felt that the acknowledgement of their suffering and apology by their perpetrators were enough to help them heal, others thought that the process opened old wounds that were better left untouched.<sup>552</sup> In this respect, the TRC could itself be supplemented by other bottom-up peacebuilding tools, such as workshops, which could offer some more personal guidance and support to the victims.

An additional way in which the state can engage with the public and contribute to reconciliation from above is through its educational system. This can be the medium through which younger generations are taught about their country's history and reasons for its divisions, thus contributing to social and psychological change. Moreover, it could induce necessary political changes by explaining the importance of a healthy democratic system and active participation of an informed citizenry. Of course, an educational system is only as good as its objectives, since it can be easily used to perpetuate a nationalist, rather than a reconciliatory message. Therefore, when assessing the impact of an educational system, it is important to look beyond its stated aims and examine what it has actually achieved in practice. For instance, while the ROC's official position is that it works towards the reunification of the island and reconciliation of its population, there is little in its history books that supports these objectives. GC history books have tended to use the term 'Cypriot' as equivalent to 'Greek' and claim that there is a historical continuity of Hellenism on the island from

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<sup>551</sup> Mikro Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', *Journal of International Criminal Justice*, 7 (2009), 89 at 93.

<sup>552</sup> Vora and Vora, 'The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner and English South Africans'.

the time of the Mycenaeans to today.<sup>553</sup> As a result, they create the impression that non-Greeks have historically had no rightful place in Cyprus, thus contributing to negative stereotypes of TC as residing parasitically on the island.<sup>554</sup> Moreover, history books rarely mention the period of 1963-1974 and the experiences of the TC community, while they place comparatively overwhelming emphasis on the suffering of the GC during the 1974 Turkish invasion.<sup>555</sup> As a consequence of this, younger generations perceive themselves as the only victims and members of the other group as the only perpetrators and are therefore more reluctant, when compared with their parents, to support a potential peace agreement.<sup>556</sup>

If education is to contribute to a more peaceful and reconciled Cyprus therefore, it is imperative that these educational practices are modified. Such a change took place in 2004 by the 'Turkish Republic of Northern Cyprus' ('TRNC') and although TC history books can still be improved, important steps have been taken in the right direction. The previous textbooks 'could themselves provide textbook examples of all that can go wrong with a history textbook':<sup>557</sup> they described the war of 1974 as the 'Happy Peace Operation' when the 'Heroic Turkish Army' came to safeguard the 'Turks of Cyprus', while they completely failed to mention GC suffering during this period.<sup>558</sup> The current books still refer to the 1974 war as a 'peace operation' (the adjective 'happy' has been dropped), but they avoid references to 'Our Motherland Turkey' and portray nationalism as a divisive and conflictual, rather than heroic, ideology.<sup>559</sup> It is only by taking steps in this direction, even before a peace agreement has been signed, that reconciliation can be promoted and psychological change necessary for peace can take place. Moreover, upon the creation of the federal state, the ethnic groups should adopt a common educational policy and curriculum; the

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<sup>553</sup> Yiannis Papadakis, 'History Education in Divided Cyprus: A Comparison of Greek Cypriot and Turkish Cypriot Schoolbooks on the 'History of Cyprus'', (Nicosia: Peace Research Institute Oslo, 2008) at 7.

<sup>554</sup> Spyros Spyrou, 'Those on the Other Side: Ethnic Identity and Imagination in Greek Cypriot Children's Lives,' in Helen Schwartzman (ed.), *Children and Anthropology: Perspectives for the 21<sup>st</sup> Century* (Westport: Bergin & Garvey, 2001), 167.

<sup>555</sup> Papadakis, 'History Education in Divided Cyprus: A Comparison of Greek Cypriot and Turkish Cypriot Schoolbooks on the 'History of Cyprus'' at 9.

<sup>556</sup> Alexandros Lordos, Erol Kaymak and Nathalie Tocci, 'A People's Peace in Cyprus: Testing Public Opinion on the Options for a Comprehensive Settlement', (Brussels: Centre for European Policy Studies, 2009) at 15.

<sup>557</sup> Papadakis, 'History Education in Divided Cyprus: A Comparison of Greek Cypriot and Turkish Cypriot Schoolbooks on the 'History of Cyprus'' at 12.

<sup>558</sup> Ibid., at 14.

<sup>559</sup> Ibid., at 18.

refusal of Bosnian elites to agree to this must count as one of the most important reasons for the perpetuation of nationalist feelings among the country's youth.<sup>560</sup>

Finally, alternative peacebuilding strategies should seek to reduce socio-economic divisions among different groups within the population. Such divisions are particularly obvious in SA and Cyprus, where almost a century of apartheid policies in the first case and the economic and political embargo of the 'TRNC' in the second, have left one ethnic group economically considerably better off than the other. Even in BiH, with its recent socialist past and relative socio-economic equality, '[e]conomic grievances have come to be defined in ethnic terms' and therefore have to be addressed as part of the peacebuilding process.<sup>561</sup> Economic conflicts can be managed either through top-down peacebuilding strategies, such as the Varosha/Ercan Airport suggestion in Cyprus, or from the grassroots up, as was the case with the 'Imagine Co-existence' project in BiH. Additional suggestions could include fighting corruption, a money-draining phenomenon in any economy, or providing cheap credit to vulnerable and economically disempowered members of the population on the condition that they will use it to set up small businesses.

While each society could and should adopt its own tools and strategies to deal with economic inequalities within its population, what is important is that these methods actually achieve their objectives, rather than just look good on paper. Perhaps the biggest disappointment in this respect is the SA BEE programme mentioned in Section 2.<sup>562</sup> The ANC government had promised 'a stable and growing economy that erases the inequalities of the past and draws [all South Africans] into a more prosperous and equitable future'.<sup>563</sup> BEE was supposed to be a 'poverty-fighting force' that would put the black community's economic power on a par with its

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<sup>560</sup> European Commission against Racism and Intolerance, 'Second Report on Bosnia and Herzegovina', at [61]-[72].

<sup>561</sup> Haider, '(Re)Imagining Coexistence: Striving for Sustainable Return, Reintegration and Reconciliation in Bosnia and Herzegovina' at 98.

<sup>562</sup> The term 'black' in Black Economic Empowerment refers to non-white populations – Africans, Indians and Coloured South Africans. Yet, in addition to its other deficiencies, BEE has on occasion been 'advertised' as seeking to 'empower the black community in general and *African people in particular*', which undoubtedly has done little to promote reconciliation among the racial groups in the country. (African National Congress, 'Social Transformation: Fighting Poverty and Building a Better Life', (Discussion paper presented at the ANC's 51st National Conference, Stellenbosch, 2002) at 5, my emphasis.)

<sup>563</sup> President Mbeki's *State of the Nation* address to Parliament in February 2003, cited in Iheduru, 'Black Economic Power and Nation-Building in Post-Apartheid South Africa' at 2.

political one and would lessen the potential for civil strife.<sup>564</sup> The programme has been given effect through several laws, which require *inter alia* that 2% of the proceeds from privatisation of state assets finance businesses owned by previously disadvantaged individuals<sup>565</sup> and that bidders for government contracts allocate at least 40% equity shareholding to previously disadvantaged people.<sup>566</sup> In practice however, BEE has ignored the fact that the majority of non-whites lack the skills or training to join the most lucrative sectors of the economy, especially at the executive management levels. This, combined with the endemic corruption that exists in SA, has turned a tiny number of black individuals into millionaires while most of the rest of the black community suffers, an outcome that is unlikely to contribute to feelings of justice among the population.

This brief description of alternative peacebuilding strategies, whether top-down or bottom-up, suggests that they can only be effective in achieving their goals when certain conditions have been satisfied. For example, the success of the TRC in SA and the relative failure of the Cypriot reconciliation-promoting initiatives suggests that particular attention should be paid to the extent to which the measures are actually known by, reach and affect the people on the ground. Moreover, while 'Imagine Co-existence' in BiH was a success, the programme's limited budget, which only allowed it to fund a small number of projects, and its short-term span (it only lasted for 2 years) restricted the effects it could have had both in terms of socio-economic and psychological changes. Admittedly, despite their advantages, people-centred strategies, especially bottom-up ones require a long-term commitment, which can be difficult for peacebuilders, both financially and in terms of personnel management. Finally, as the examples of the school syllabus in Cyprus and BEE in SA suggest, a peacebuilding strategy should not only claim to be working towards a set of objectives, but the way it is structured and operates should actually reflect that in practice.

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<sup>564</sup> Speech by the President of the ANC-aligned National African Federated Chambers of Commerce in 1996, cited in Iheduru, 'Black Economic Power and Nation-Building in Post-Apartheid South Africa' at 2.

<sup>565</sup> National Empowerment Fund Act [No. 105 of 1998].

<sup>566</sup> Preferential Procurement Policy Framework Act [No. 5 of 2000].

Human rights must be supplemented by other institution-focused, and more importantly, other people-centered peacebuilding strategies as well. This conclusion rests on the belief that the liberal peacebuilding model used today – of which human rights are at the centerpiece – is flawed. It creates a skewed type of peace that puts too much emphasis on how the structures and institutions of the society look like from the outside, to the detriment of how they operate and affect the people on the inside. This deficiency calls for the replacement of the liberal peacebuilding model with an alternative one, which as suggested above, uses a range of strategies in order to induce more holistic changes on the ground. In particular, by recognising that human rights can promote legal and institutional, but not other types of changes, the alternative strategy relies on mechanisms that will affect the divided society politically, socially, economically and psychologically as well. Importantly, the claim here is not that human rights should be abandoned; after all, they do important work. However, policy makers must recognise their weaknesses and in taking them off the pedestal, also make room for alternative peacebuilding strategies. This section has provided examples of such strategies, but all three case studies would benefit from further research on the effects of these often-underexplored peacebuilding tools.

#### **4. Conclusion**

Human rights tend to be popular solutions to political conflicts due to the intuitive appeal they command and because they fit well within the international community's liberal peacebuilding strategy. It is unsurprising that international peacebuilders, in particular, have adopted such a liberal recipe of legal amendments and institutional improvements expecting peace to follow: the alternative peacebuilding strategy requires local expertise, long-term commitment and more money than the international community has been willing to provide so far. While liberal peacebuilding might be convenient however, it is ultimately faulty. The challenges that can emerge during the implementation of new laws and institutions can create the misleading impression that when this has been achieved, peace has also been built. This chapter has argued that, to the contrary, successfully enforcing human rights is only the beginning and not the end of the peacebuilding process; it can result in necessary legal changes, which are nevertheless insufficient on their own to build peace.



Thus, in addition to legal amendments that are undoubtedly important and which tend to be induced through human rights protection, peacebuilders must also pay attention to socio-economic, political and psychological changes that are also necessary for successful conflict management. In order for these changes to take place, a series of peacebuilding strategies that supplement human rights protection should also be adopted. These can be top-down peacebuilding strategies, or, they can encourage change from the grassroots up; in both cases however this change should be concerned with people on the ground, their feelings, beliefs and socio-economic conditions rather than with laws and institutions. The argument here is not that institution-building and human rights protections are not important; in fact, they are absolutely necessary. However, their limitations – and explanations for these limitations – must be understood, acknowledged and acted upon. Only then can liberal peacebuilding tools be strengthened through other strategies, and more effectively achieve peacebuilders' objectives.

## **Chapter 8: Conclusion**

### **1. Introduction**

The increased – and largely uncontested – legitimacy of human rights has turned them into a ‘worldwide secular religion’ and any criticisms of how they operate into heresy.<sup>567</sup> One consequence of this popularity is that their protection in ethnically divided, post-conflict societies is currently considered as an integral part of the peacebuilding package; reflective of this is the UN’s declaration that ‘the human rights component of a peace operation is indeed critical to effective peacebuilding.’<sup>568</sup> Yet, such declarations have rarely been justified and the specific contributions of human rights have never been fleshed out. As a result of this inadequate, or even inexistent, theoretical framework, peacebuilding on the ground has also suffered from major deficiencies. This thesis aims to fill the gap in peacebuilding theory and practice by answering a series of questions: is the legal protection of human rights always positively connected to the building of peace? If no, why and what should be done about that?

It transpires that over-enthusiasm and lack of clarity as to the meaning of both ‘peace’ and ‘human rights’ have clouded the nuanced relationship that exists between the two terms. This thesis argues that human rights can indeed contribute to peace in important ways. In particular, their protection can send the message that the injustices and atrocities of the war have been left behind and can create a newfound sense of security among the population. The combination of these positive changes could, in best-case scenarios, also make members of different ethnic groups more willing to cooperate between themselves. At the same time as confirming the international community’s expectations however, a closer look at the two terms suggests that human rights could undermine, and not just promote, peacebuilding efforts. It is for instance possible that the threat of criminal trials (and punishment of perpetrators)

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<sup>567</sup> Elie Wiesel, quoted in Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton; Oxford: Princeton University Press, 2001) at 53.

<sup>568</sup> Panel on United Nations Peace Operations, ‘Report of the Panel on United Nations Peace Operations’, (New York: United Nations, 2000) (henceforth, ‘Brahimi Report’) at [41].

after the war disencourages armed groups to stop their fighting or that the black and white distinctions of the human rights language fail to reflect the subtleties of what happened during the conflict. Perhaps the most underexplored facet of the relationship between peace and human rights is the possibility that the two are not connected at all because the former makes much broader demands than what the latter can deliver. Illustrative of this is the fact that peace requires that the previously warring parties have reconciled their differences, something that is most effectively achieved through negotiations in the political arena rather than through legal battles about the protection of human rights. This more nuanced understanding of the relationship in question calls for the enrichment of the liberal peacebuilding strategy, which assumes that there are only positive connections between rights and peace. Instead, policy makers should adopt an alternative approach that relies on the strengths of human rights, while at the same time, acknowledging their limitations and addressing them accordingly.

These conclusions are of practical significance in different ethnically divided, post-conflict societies around the world, but they are particularly topical for Cyprus, the case study that was the inspiration for this thesis. The Cypriot conflict seems to be frozen in time: the last serious occurrence of violence took place on the island in 1974 and negotiations for a peace agreement have been revolving around the same questions at a painstakingly slow pace ever since. The only time the parties came close to solving the Cypriot Rubik's cube was in 2004 when in a referendum to the communities, Turkish Cypriots accepted, but Greek Cypriots resoundingly rejected the 'Annan Plan', the comprehensive peace settlement that was on the table.<sup>569</sup> Despite the frustrating inertia characterising the Cypriot negotiations however, 2015 could be a year of great changes for the small Mediterranean island. The discovery of hydrocarbons in Cyprus' exclusive economic zone has shaken the parties out of their comfortable status quo and brought to the fore the necessity of resolving the Cyprus problem once and for all.<sup>570</sup> Political leaders are under increasing international pressure to resolve their differences and they have been warned that a failure to agree

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<sup>569</sup> The Comprehensive Settlement of the Cyprus Problem, finalised on 31 March 2004 and put to a referendum on 24 April 2004.

<sup>570</sup> International Crisis Group, 'Aphrodite's Gift: Can Cypriot Gas Power a New Dialogue?', (Nicosia/Instabul/Brussels: International Crisis Group, 2012).

on a peace settlement could realistically lead to a partition of the island.<sup>571</sup> The consequent realisation that maintaining the status quo can be detrimental to Cyprus' political and economic prospects has led to cautious optimism about the outcome of the negotiations. Writing this thesis while being only a few minutes away from the UN buffer zone separating the two Cypriot communities, I can only hope that its conclusions are taken seriously by the international peacebuilders and political elites that hold the island's fate in their hands.

## **2. The theoretical contribution of the thesis**

The precise nature of the relationship between peace and human rights is an issue of global importance: the international community's rather shy and isolated peacebuilding attempts in the early 1990s have been succeeded by the creation of a permanent UN Peacebuilding Commission, the development of a 'responsibility to protect' conflict-ridden countries and the launching of ever more ambitious and frequent peacebuilding operations around the world. Nevertheless, this increased legitimacy of and confidence in peacebuilding operations has usually not been accompanied by equally positive results in practice: almost always the ethnic divisions that caused the conflict remain salient and the belief that violence will not resume again is absent. This state of affairs might be an improvement when compared to the war that destroyed these countries, but it is a far cry from peace. Undoubtedly, an explanation for the mixed results of these operations lies with the specific tools and methods that peacebuilders have opted to use and the assumptions they have employed in the process. The most popular of these methods, usually referred to as liberal peacebuilding, focuses on the creation or improvement of democratic and free market structures, both of which rely on the effective protection of human rights.<sup>572</sup>

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<sup>571</sup> For instance, the UN Secretary-General's Special Adviser on Cyprus stated on Cypriot national television that 'I think we are close to a last chance. The UN has been here for 50 years. There have been many negotiators. I am the 25<sup>th</sup> and I actually think, I don't know, that I am the last one. I hope I am the last one for good reasons that we will end up with a solution and not the last one because we will all give up and something very different would happen.' (Interview with Mr. Espen Barth Eide, 27 November 2014, Nicosia, Cyprus.)

<sup>572</sup> Reflecting the liberal peacebuilding assumptions, *An Agenda for Peace* states that '[t]here is an obvious connection between democratic practices [...] and the achievement of true peace and security in any new and stable political order.' (UN Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General Pursuant to the

Thus, the conclusions about the relationship in question are relevant to the broader debate about the effectiveness of liberal peacebuilding and could have enormous consequences in both human and financial terms.

Peace in ethnically divided, post-conflict societies consists of three elements that sometimes have a mutually supportive and, at other times, a contradictory relationship with each other. *Security* exists when the conditions on the ground prevent a sense of fear from war, internal conflict or serious crime. The second element of peace, *justice*, demands that the injustices of the war are remedied and that they are prevented from being repeated in the future. Finally, *reconciliation* requires the creation of meaningful relationships of cooperation – on the personal and political levels – between former enemy parties. Human rights have a different relationship with each of the three elements since they can induce feelings of security, justice and reconciliation in different ways and to various extents. While for example, a law allowing restitution could promote feelings of justice among the displaced population, it would not necessarily also make the people feel secure enough to return, or encourage them to rebuild friendly relations with their old neighbours. Similarly, punishing perpetrators for human rights violations that took place during the war might induce feelings of security and justice among the victims, but it could undermine reconciliation if the criminal trials are perceived as favouring members of one ethnic group over the other.

War often breaks out, to the detriment of the three elements of peace, when conflicts, which naturally exist in any diverse society, remain unaddressed, grievances build up and are eventually externalised in a violent manner. The continued existence of such seemingly unmanageable conflicts between the parties in the early stages of the peacebuilding process makes the balance between the elements of peace more difficult to strike. Such conflicts stem from fundamental disagreements, like whether the state should protect ethnic groups or individual citizens, which are unsusceptible to compromise because each side sees any step towards the other's direction as unfair. A successful peacebuilding operation therefore is one that transforms these fundamental conflicts into smaller, more manageable ones. Conflicts of this second

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Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992', (New York: United Nations, 1992) at [59].)

type arise from evidentiary differences or disagreements as to interpretation and are more likely to be negotiated successfully because they concern more-or-less rather than either/or questions. The relationship between human rights and peace therefore, depends on the extent to which the former can make fundamental, zero-sum conflicts more manageable and as a result, ease the balancing between security, justice and reconciliation.

The expectation among peacebuilders is that human rights can help manage conflicts but that they sometimes fail because of unimplemented judicial decisions.<sup>573</sup> As a result, the usual response to the disappointing outcomes of peacebuilding operations is to insist on human rights protections even more and push harder for their enforcement. This strategy can yield results: often conflicts stay unresolved and policies that could contribute to peace remain unimplemented because of the political elites' unwillingness to act. In such cases, addressing the issues of variable enforcement of human rights decisions (usually through international pressure) could be the fastest and most efficient way to peace. Nevertheless, non-implementation of human rights decisions is not the only, or indeed the most important hurdle to peacebuilding efforts. It is, for example, possible that a decision will be implemented, but that the resulting legal amendment – whilst protecting the interests of the individual applicant – will not have any broader positive effects on peace in the divided society. It is therefore not only important to exert pressure for the implementation of a human rights decision, but also to pay attention to the specific measures that will be taken to enforce it and what their effect is likely to be in practice. Desperate for a success story, peacebuilders will often celebrate the change in the letter of the law, but pay little attention to its consequences on the ground.

Even more damaging to the orthodoxy of liberal peacebuilding however, are two additional conclusions, which suggest that sometimes ethnically divided, post-conflict societies need less human rights, not more. It is true to argue that human rights can contribute to conflict management, but this is also a generalisation. Rights are most well suited in dealing with those conflicts that stem from interpretive or evidentiary

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<sup>573</sup> Michelle Parlevliet, 'Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management', *Track Two Occasional Paper* 11(1) (Cape Town: Centre for Conflict Resolution, March 2002), 1.

disagreements between the parties; the most effective way of managing these is through a well-structured and reasoned debate and the best forum for such a debate is the court. At the same time however, if the conflict in question is of a more fundamental nature (involving, for example, a disagreement about the structures of the state itself), then rights adjudication is unlikely to contribute to its successful management. Such disagreements do not comfortably fall within the ambit of human rights and can therefore not be managed by Courts; rights are intended to operate within a given framework, not build it from scratch, which is often what fundamental conflicts are all about. Thus, while the right to vote made important contributions to the dilemma of who should be allowed to vote in SA, it has been less effective in providing guidance on the structure of the electoral system in Cyprus. Peacebuilders interested in the first question were right to use human rights provisions, but those seeking to answer the second should consult the political science literature instead.

Even in cases where the conflict has been adjudicated (it relates in other words to a practical rather than a fundamental disagreement) and the Court's decision has been enforced, questions still remain about the extent to which human rights can contribute to its successful management. The demands of security, justice and reconciliation suggest that a series of changes are necessary for an ethnically divided society to be transformed into a peaceful one; legal, political, socio-economic and psychological factors have to be considered and various steps have to be taken to ensure changes in all these directions. Human rights are ideal tools to promote some of these changes and in particular those that relate to the amendment of laws or the reforming of institutions. Illustrative of this are the amendments made to the electoral law in Cyprus after *Aziz* and the numerous legal and institutional changes that followed after the implementation of the right to property in BiH. At the same time however, human rights remain largely unable to induce the political, socio-economic and psychological changes that are also necessary for peace. This inability is particularly detrimental for reconciliation, which is most effectively promoted in psychologists' offices, religious institutions and school classrooms rather than socially detached courtrooms. Thus, it is necessary for human rights to be supplemented by peacebuilding tools and methods that focus, not on the institutions and laws in the ethnically divided society, but on the people themselves. These can either be planned from the top-down (for example, by

creating a Truth and Reconciliation Commission) or emerge from the bottom-up (for instance, by jointly renovating a school or library in an ethnically mixed community).

### **3. Getting from peace in the books to peace on the ground**

The theoretical conclusions of this thesis suggest that in addition to the positive connections between peace and human rights, the latter can influence negatively or leave unaffected the former as well. If that is the case, then peacebuilders are faced with a choice: continuing to use the liberal, human rights-centred peacebuilding strategy or adopting an alternative policy that also acknowledges the limitations of human rights and seeks to supplement them in other ways. Peacebuilders in the case studies that have been examined in Part 2 of this thesis – Bosnia and Herzegovina (BiH), South Africa (SA) and Cyprus – have so far, opted for the first choice. While the international community's operations in BiH offer, from beginning to end, a textbook example of the traditional liberal peacebuilding approach, the SA process started out differently. The specific context of the conflict and the history of the African National Congress that played a leading role in the fight against apartheid, caused SA to originally adopt more people-centred strategies; illustrative of this is the great emphasis on the Truth and Reconciliation Commission. However, over the years and as budgetary considerations became more important, peacebuilding practices in the country started resembling the liberal strategy that was being implemented in BiH. Similarly, the architects of the (albeit underdeveloped) Cypriot peacebuilding process have so far failed to rethink and challenge their assumptions; as a result, the strategies they have adopted differ very little from those in the other two case studies.

The two approaches are not antithetical to each other; the alternative policy does not call for the abandonment of liberal peacebuilding, but for its enrichment. Nevertheless, important differences do exist between them. On the one hand, liberal peacebuilding is characterised by a concern as to how various strategies (and their final outcome) look like from the outside, rather than how they are experienced from the inside. Its primary focus is on the legal amendments and institutional changes that are considered necessary for building peace and little, if any, attention is paid to how these affect the people in practice. Thus, the dismantling process of the International



Criminal Tribunal for the Former Yugoslavia (ICTY) is exclusively concerned with the number of cases that have been decided so far, the creation of a Sarajevo War Crimes Chamber and the transferring of cases from the international tribunal to the domestic courts.<sup>574</sup> Attention has never been paid to the effects of the ICTY's case law on the Balkan population, or even on how the immediate victims and perpetrators feel during and after the trial.<sup>575</sup> Moreover, liberal peacebuilding is characterised by the tendency of peacebuilders to step back as soon as they have delivered the remedy and complied with the letter of the law. Their involvement is usually short-term and they rarely stay in the post-conflict society long enough to observe, let alone assess, the consequences of their practices. Perhaps the most representative example of this is the Bosnian Property Law Implementation Plan, which was set up, implemented and concluded within 3 years; its effects were a success on paper, but there was little acknowledgement of the fact that the remedy was in practical terms often a disappointment.<sup>576</sup> Even in cases where peacebuilders realise that complying with the law is only the first peacebuilding step because, for example, more long-term socio-economic changes are also necessary, they tend to avoid becoming more heavily involved. Reflective of this is the South African Government's decision to offer displaced communities post-restitution support through strategic partnerships with private companies, rather than by participating in the process itself.<sup>577</sup>

On the other hand, the alternative peacebuilding policy focuses not only on institutional and legal amendments, but also on how these are experienced by the people on the ground. It acknowledges that changes in the law are important for the building of peace, but they are only among the first steps in this process. Thus, it also pays close attention to the context in which these amendments are implemented and takes into account the political and socio-economic conditions, which will ensure that the legal changes are meaningful. Finally, it focuses on the general public and takes

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<sup>574</sup> Fidelma Donlon, 'Rule of Law: From the International Criminal Tribunal of Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina', in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina* (London: Ashgate, 2008), 257.

<sup>575</sup> Patrice McMahon and David Forsythe, 'The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics', *Human Rights Quarterly*, 30 (2008), 412.

<sup>576</sup> Charles Philpott, 'Though the Dog Is Dead, the Pig Must Be Killed: Finishing with Property Restitution to Bosnia Herzegovina's IDPs and Refugees', *Journal of Refugee Studies*, 18 (2005), 1.

<sup>577</sup> Bill Derman, Edward Lahiff and Espen Sjaastad, 'Strategic Questions About Strategic Partners', in Cherryl Walker et al. (eds.), *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Athens: Ohio University Press, 2010), 306.

steps to ensure that the successful implementation of the remedies will also induce the desired psychological changes that are necessary for peace. Offering more than a sketch of what the alternative peacebuilding policy looks like in practice is impossible because it differs, by its nature, from country to country. Bearing this limitation in mind however, it is possible to discern certain characteristics that it should always possess.

First, it values the contributions of different types of professionals, and not just lawyers – teachers, journalists, religious leaders and psychologists can also play a key role in the peacebuilding process. Second, the grassroots are actively involved in the implementation of the alternative peacebuilding policy and steps are taken to ensure that they understand and benefit from it as much as possible. Third, the majority of peacebuilders are locals because they are more in touch with the population than their international colleagues, they are familiar with the language(s) and culture of the ethnically divided society and are therefore not considered outsiders. Fourth, the alternative policy favours the adoption of long-term strategies over quick fixes and consequently tends to avoid bodies with exceptional powers, such as the High Representative in BiH; rather, the focus is on the organic development of a democratic culture and feelings of reconciliation. This offers additional arguments for the preference of local peacebuilders over internationals since the former are less likely to leave their posts and be replaced halfway through the long process by someone who is not familiarised with the context. Moreover, the continuous and long-term involvement of internationals in the domestic affairs of the state can be counter-productive, as it might be perceived as an illegitimate intervention or paternalism.

The liberal and alternative peacebuilding policies vary because ultimately they aim to achieve different things. The former is based on the assumption that the final objective is the improvement of the laws and institutions in the post-conflict society. Feelings of security, justice and reconciliation are necessary, but they do not fall within the concerns of the peacebuilder because they are believed to follow automatically from the legal amendments. Conversely, while still relying on the three elements of peace, the alternative peacebuilding policy pays much closer attention to what its traditional counterpart ignores. It acknowledges that when the conflict dividing the society in question is a fundamental one, balancing security, justice and

reconciliation becomes almost impossible. Peace, therefore, requires the transformation of such conflicts into simpler and more easily manageable practical disagreements. This conflict transformation cannot be achieved through legal and institutional amendments alone; it is also necessary that the very identity of the population changes and the people's allegiance to their ethnic group is ultimately supplemented by a sense of civic nationalism. Thus, the 'Greekness' or 'Turkishness' of Greek and Turkish Cypriots respectively, must be supplemented by their 'Cypriotness', which will act as a bond holding the two groups together. Only when this considerably longer process is completed will the objectives of the alternative peacebuilding model have been achieved.

#### **4. Assessing the past: Bosnia and Herzegovina and South Africa**

At the moment, the peacebuilding operations in BiH and SA seem to be coming to a close: the remedying of displaced people has finished or will be completed soon, the Truth and Reconciliation Commission in SA has published its results, the ICTY is wrapping up its operations and the High Representative is becoming less and less actively involved in Bosnian politics. Yet, the implication of this thesis' conclusions is that ending the peacebuilding processes would be a mistake because BiH, and to a lesser extent SA, are still divided by fundamental conflicts and, as a result, suffer from a lack of security, justice and reconciliation. Many of the lingering conflicts in the two countries are due to deficient liberal peacebuilding strategies; for instance, when addressing the issue of forced displacement, peacebuilders in both countries focused their attention on legal amendments to the detriment of other types of changes that had to take place. This cemented the geographical segregation of ethnic groups in BiH on the one hand and failed to narrow the economic divide between blacks and whites in SA on the other. It is of course impossible to go back and redesign these peacebuilding strategies using principles consistent with the alternative model. There should however, even today, be an attempt to adopt certain policies that can supplement liberal peacebuilding and manage divisive conflicts more effectively.

In the case of BiH it is absolutely necessary that, before the peacebuilding process is completed, a common educational strategy across the three ethnic groups is adopted.

At the moment, Bosniac, Serb and Croat students attend monoethnic schools (and in cases where students from two ethnic groups have to use the same building, two different administrations have been set up), are taught different versions of history and different national languages.<sup>578</sup> As a result, and although peace is technically being built in BiH for the last two decades, the younger, post-war generation is generally more nationalist than that of its parents.<sup>579</sup> A common educational strategy would deal with this by stopping the perpetuation of myths about what happened during the war; eventually perceptions that only one group was the victim or the perpetrator of the conflict would be abandoned. Moreover, if students were taught the same syllabus, there would be no need to maintain the ethnically segregated school system that exists at the moment and which prevents young people from meeting members of the other ethnic groups. In the long term, adults taught in schools that promote reconciliatory values, would be less likely to support parties that have a nationalist agenda and be more receptive to the idea of a Bosnian civic nationalism.

Similarly, and although fundamental conflicts have been transformed to practical disagreements to a much greater extent in SA than in BiH, additional steps are still necessary to close old apartheid wounds. South African officials should explain to the public what the compensation amount paid to displaced families signifies; it should be made clear to the public that compensation is not charity from the state to certain poor members of the community, but a unique material apology for past injustices. The Commission on Restitution of Land Rights (CRLR) should also make it its priority to provide, even now, victims with post-restitution support in the form of training, funding and expertise. Moreover, in addition to providing compensation, the CRLR could also make available alternative forms of redress that could meaningfully change the victims' lives, such as a free university education or vocational training for their children, priority within an established housing programme or highly subsidised access to credit.<sup>580</sup> Finally, the government ought to acknowledge the failure of the Black Economic Empowerment (BEE) programme since, despite the emergence of a

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<sup>578</sup> European Commission against Racism and Intolerance, 'Second Report on Bosnia and Herzegovina', (Strasbourg: Council of Europe, 7 December 2010) at [63].

<sup>579</sup> Speech by Mr. Christopher Bennett, the Deputy High Representative, at the launch of Lord David Owen's book *Bosnia and Herzegovina: Ways Forward* (London School of Economics, 11 June 2013).

<sup>580</sup> Bernadette Atuahene, 'From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility', *Southern Methodist University Law Review*, 60 (2007), 1419 at 1446.

small middle-class, it has not influenced in any positive way the socio-economic position of the majority of the population. BEE, which currently favours already rich, non-white businesspeople, could be replaced by other initiatives, preferably run by the provinces and local authorities rather than the federal government, such as providing small loans to poor entrepreneurs. In this way, small-scale private initiatives that affect more people could have a greater impact in transforming the South African economy at large.

### **5. Looking ahead: building peace in Cyprus**

However, it is in Cyprus, where the peacebuilding process is still in an embryonic stage, that the alternative peacebuilding approach could make the most difference. Recognising from the outset that human rights have an important role to play in the building of peace, but that they nevertheless have to be supplemented through additional methods and strategies, can prevent Cypriots from making the same mistakes that were committed in BiH and SA. A proper understanding of the relationship between peace and human rights can help distinguish the cases in which insisting on human rights protections would be to the benefit of the peacebuilding process, from those where it would simply be wiser to direct the, usually limited, peacebuilding resources in other directions.

However, advocates of the alternative approach are likely to face an uphill struggle since signs of the traditional, liberal peacebuilding recipe – and its limitations – are already appearing in Cyprus. It is clear, for instance, that while the European Court's remedies for property violations on both sides of the Green Line look good on paper, they do not really promote justice or reconciliation on the ground. The most important reason for this is the fact that the right of Turkish Cypriots is protected by the authorities of the Republic of Cyprus, while that of Greek Cypriots by Turkey. Thus, although both states are theoretically trying to protect the right in question, the mistrust between them, fuelled by the lack of a peace agreement and the ongoing negotiations, has resulted in less than satisfactory results on the ground. Technically protecting human rights therefore, is not enough; their protection must take place after certain conditions have been met, alongside strategies that can induce not only legal

and institutional amendments, but political, socio-economic and psychological changes as well.

The condition that can boost the effectiveness of human rights in Cyprus the most and that should be the first priority for peacebuilders at the moment, is the signing of a peace agreement. This requires that politicians start behaving responsibly for the sake of the common good, rather than as spoilers in order to protect the vested interests they have acquired by maintaining the status quo over the last decades. Moreover, while the laws and institutions of the new Cypriot state should respect human rights, greater attention should be paid to other methods that can address the wariness and fear that exists between Cypriots of the two communities. Among such methods could be the adoption of a common history curriculum and the teaching of Greek and Turkish in schools.<sup>581</sup> In addition to government initiated top-down strategies, media outlets and civil society organisations can also start engaging with the grassroots more effectively in order to spread a reconciliatory message from the bottom-up. It is these steps, which can contribute to social and psychological changes among the population, that make the protection of human rights real in the lives of the people and more meaningfully contribute to feelings of security, justice and reconciliation.

At the same time however, the fact that human rights have to be supplemented by peacebuilding tools, should not cloud the fact that Cyprus is indeed in need of major legal and institutional changes. Perhaps one of the most important contributions that human rights can make is through the work of the Law Commission, an institution that currently does not exist in Cyprus. This body of independent legal experts could examine whether proposed legislation is compatible with human rights or other social objectives, such as reconciliation, and make recommendations to the legislature. Additionally, it could undertake the exercise of examining old legislation – some of it relics of Cyprus’ colonial past – in order to ensure that it promotes better inter-ethnic relations between Greek and Turkish Cypriots. Bearing in mind that an increasing number of Turkish Cypriots are permanently residing in the areas controlled by the Republic of Cyprus today, this exercise could start taking place before a peace

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<sup>581</sup> The ‘Turkish Republic of Northern Cyprus’ has already taken steps in this direction: old history books have been replaced by less nationalist – albeit not perfect – ones in 2004, while teacher associations suggested the teaching of Greek in Turkish Cypriot schools in 2014.

agreement is signed in order to prepare the public for the changes that are going to take place. However, after the signing of the peace agreement, the Law Commission's role could become even more important as it could pre-emptively monitor the legislation that is passed by the federal and constituent states in order to avoid any detrimental consequences for peace. In addition to the pre-emptive contribution of human rights to peace through the workings of the Law Commission, their judicial protection after the event, irrespective of the applicant's ethnicity, could promote feelings of security and justice among the population.

## **6. Conclusion**

This thesis argued that there have been very few attempts to justify the existence of the liberal peacebuilding strategy in general or the insistence that human rights can help manage ethnic conflicts in particular. Consequently, the resulting peacebuilding practice, basing itself on little more than hunches and wishful thinking, has failed to achieve its goals and objectives. In light of the lessons learned from Bosnia and Herzegovina, South Africa and Cyprus, I have argued that there is indeed a positive relationship between human rights and peace. However, in order for the former to help promote the latter, rights must be supplemented by other peacebuilding tools which focus on political, socio-economic and psychological changes, in addition to legal amendments.

This conclusion, in favour of an alternative peacebuilding approach, is not intended to be revolutionary; the traditional, liberal peacebuilding policy should merely shift its emphasis, not abandon it altogether. Unavoidably, the specific directions in which the emphasis will be shifted and the context-specific peacebuilding strategies that will supplement human rights vary from one ethnically divided, post-conflict society to the other. While only a general sketch of the alternative peacebuilding policy can be outlined however, it is clear that it will be more time-consuming and require greater resources and attention to detail than any liberal, human rights-focused peacebuilding process that has been tried so far. These are significant hurdles, yet it is only by adopting a more holistic peacebuilding approach that conflict transformation can be

achieved. The alternative policy might make peacebuilding more challenging, but it also makes it more real.



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## **Appendix: Background information on the three case studies**

### **1. Bosnia and Herzegovina**

Bosnia and Herzegovina (BiH) is a small Balkan country with a population of about 4 million people. From 1922 and up until the Balkan wars, it was, together with Serbia, Croatia, Slovenia, Macedonia and Montenegro, one of the six republics making up the Socialist Federal Republic of Yugoslavia. At the end of the 1980s, with the communist ideology losing its hold, Serbian and Croatian nationalisms, which had been repressed during Tito's regime, surged back to life. This led Slovenia and Croatia to declare their independence in 1991 and, being concerned about its territorial integrity from Serbian and Croatian expansionism, BiH followed suit in March 1992.<sup>582</sup> Claiming that Bosnian independence contravened with the Yugoslav Constitution, Serbia sought to prevent it through military force. This led to the swift polarisation between the three large minorities that make up most of BiH's population. The last census, which had taken place in 1990 before the war, showed that there were 43% Bosniacs, 31% Bosnian Serbs and 17% Bosnian Croats in the country and it is among these groups that the war was fought.<sup>583</sup> The main distinguishing characteristic between the three groups is their religion, with Bosniacs, Croats and Serbs generally being Muslims, Catholics and Christian Orthodox respectively.

Serbs attacked BiH in March 1992 and by June 1992 the Serb-controlled Yugoslav Peoples Army, with the help of Bosnian Serbs, controlled more than 60% of the country.<sup>584</sup> By that time, Croatia also joined the fighting and declared the creation of Herceg-Bosna, an independent Bosnian Croat state, making up about 20% of BiH.<sup>585</sup> The war had become a three-cornered conflict with Serbia claiming, and getting, the lion's share of the country's territory. After a series of failed peace attempts, Serb

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<sup>582</sup> For a history of the Balkan wars, see Sabrina P. Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the Fall of Milošević* (4<sup>th</sup> edn.; Boulder: Westview Press, 2002).

<sup>583</sup> Census, 1991, 'Ethnic Composition of Bosnia-Herzegovina Population, By Municipalities and Settlements, 1991', Zavod za statistiku Bosne i Hercegovine, Bilten no. 234, Sarajevo. (Cited in Ramet, *Balkan Babel* at 241.) Most of the remaining 9% described itself as 'Yugoslav', a category that is today obsolete.

<sup>584</sup> Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the Fall of Milošević* at 207.

<sup>585</sup> *Ibid.*, at 209.

advances were curbed in March 1994 when the Washington Agreement was signed;<sup>586</sup> this was an agreement between the Bosniacs and Croats, who joined forces to fight off the Serbs.<sup>587</sup> In addition to military cooperation, the Washington Agreement also brought the two ethnic groups together politically in the form of the Federation of Bosnia and Herzegovina, which is one of the two entities making up the country today. The final chapter of the war was written in August 1995 when NATO began a sustained bombing campaign against strategic targets to force the withdrawal of Bosnian Serb forces from around Sarajevo. Under the continuing threat of further bombings, the leaders of the three ethnic groups were summoned to Dayton, Ohio to negotiate a peace agreement. The General Framework or Dayton Agreement, signed on 14 December 1995 in Paris, marked the end of the war and the independence of the state of Bosnia and Herzegovina.

Before the war, the three ethnic groups had been living in ethnically heterogeneous areas throughout Bosnia, so the creation of ethnically cleansed areas, a key objective of the combatants, had required the mass killing and displacement of members of all ethnic groups. The estimated number of casualties of the Bosnian war has ranged considerably because of political bias, the varying methodologies used in different studies and the lack of access to accurate information. Initial estimations suggested that there were more than 200,000 dead as a result of the Bosnian war,<sup>588</sup> but more recent and well-documented research puts the number closer to 100,000 with a minimum of 97,207 deaths.<sup>589</sup> Moreover, an estimated 2,632,928 people – more than half of the pre-war population – had been displaced either in BiH or abroad by the end of the conflict.<sup>590</sup> As a result of these tactics, by 1995, the separatists had largely achieved their objectives and BiH was divided into three largely ethnically homogeneous areas. It is as a response to this mass displacement and change in BiH's

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<sup>586</sup> Washington Agreement, signed on 18 March 1994.

<sup>587</sup> These Bosniac-Croat advances were aided by economic and morale problems that were being faced by the Serbs from 1994 onwards. Moreover, and despite the ongoing UN arms embargo, by that time both Bosniacs and Croats had managed to numerically and technologically improve their weaponry considerably (Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the Fall of Milosević* at 230).

<sup>588</sup> *Ibid.*, at 239.

<sup>589</sup> Patrick Ball, Ewa Tabeau and Philip Verwimp, 'The Bosnian Book of Dead: Assessment of the Database', (Sussex: Households in Conflict Network, 2007).

<sup>590</sup> Organisation for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, 'Special Report: Musical Chairs: Property Problems in Bosnia and Herzegovina', (Sarajevo: Organisation for Security and Cooperation in Europe, 1996) at 45-46.



demographics that the protection of the right to property became a hugely important peacebuilding tool in the country. The right was expected to not only promote feelings of justice, but also reconciliation; the assumption was that empowering people to return to their pre-war houses would recreate ethnically mixed neighbourhoods and promote inter-ethnic communication on the ground level.<sup>591</sup> The extent to which this strategy was successful, is examined in more detail in Chapters 6 and 7 of this thesis.

The signing of the Dayton Agreement in 1995 created a new state of affairs in BiH. The Constitution is included in Annex 4 of the Dayton Agreement, while the remaining Annexes deal with other important issues concerning the ending of the war; among them, are the military implementation of the peace agreement and disarmament (Annex 1A and 1B respectively), the agreement concerning the first elections in the country (Annex 3), provisions for the return of the displaced people (Annex 7) and the civilian implementation of the peace agreement (Annex 10).<sup>592</sup> The Constitution provides that the three ethnic groups will exist under a unitary state, which operates as a loose federation. The federation consists of two entities: the Federation of Bosnia Herzegovina (FBiH), which had been established by the Washington Agreement in 1994, and the Republika Srpska. The FBiH consists of 10 cantons, 5 of which are primarily inhabited by Bosniacs and 5 by Croats, while the population in the Republika is mainly Serb. The Constitution is strictly consociational in character: the three ethnic groups – referred to in the Constitution as Constituent Peoples – have a predetermined number of seats in the executive,<sup>593</sup> legislature,<sup>594</sup> and the judiciary.<sup>595</sup> Moreover, as a further protection of the three ethnic groups, each has been granted the veto power, which it can use to block legislative and executive decisions.<sup>596</sup> Nevertheless, these characteristics have made Bosnian politics very ethnocentric and the country particularly difficult to govern.

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<sup>591</sup> Anders H. Stefansson, 'Homes in the Making: Property Restitution, Refugee Return and Senses of Belonging in a Post-War Bosnian Town', *International Migration*, 44/3 (2006), 115.

<sup>592</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995 (henceforth, Dayton Agreement).

<sup>593</sup> Constitution of Bosnia and Herzegovina, Annex 4 of the General Framework Agreement signed on 14 December 1995 (henceforth, BiH Constitution), Article V.

<sup>594</sup> BiH Constitution, Article IV.1 and IV.2.

<sup>595</sup> BiH Constitution, Article VI.1.a.

<sup>596</sup> BiH Constitution, Article V.2.c (in relation to the executive) and IV.3.e (in relation to the legislature).

It is in this political context that the right to vote is expected to result in political changes and contribute to peacebuilding attempts in the country. The right and the concept of democracy it is drawing inspiration from, have been used to challenge both entities' Constitutions,<sup>597</sup> to regulate the frequent use of the veto power,<sup>598</sup> to clarify whether there should be allocated seats for different ethnic groups in municipal elections<sup>599</sup> and, most controversially, to ask for the amendment of the country's Constitution itself.<sup>600</sup> The extent to which the right has contributed to the peacebuilding process is mixed and varies depending on which political conflict one chooses to focus on. However, the very existence of so many salient and – 20 years after Dayton – still unresolved conflicts points to a much larger political failure in the country. The unwillingness of the political elite to compromise in any meaningful way raises the question of whether the protection of the right, no matter how vigorous, can replace a healthy political culture.

One final preliminary point that must be made concerns the level of international intervention in BiH. The Dayton Agreement was based on the idea that the three ethnic groups would require significant assistance during the peacebuilding process. As a result, it made provisions for the presence of high numbers of internationals that are directly involved in the running of the country.<sup>601</sup> By far the most powerful among them is the High Representative, who was appointed responsible for the civilian implementation of the Agreement and is still operating under that mandate in BiH today.<sup>602</sup> The High Representative's powers were expanded considerably in 1996, when the appointed (and unaccountable) international official was empowered to pass any legislation he considered necessary in the two Entities and the federal level and dismiss elected officials if their actions were contrary to peacebuilding attempts.<sup>603</sup>

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<sup>597</sup> *U-5/98 (3<sup>rd</sup> Partial Opinion)* (1 July 2000, BiH CC).

<sup>598</sup> *U-8/04* (25 June 2004, BiH CC); *U-10/05* (22 July 2005, BiH CC).

<sup>599</sup> *U-4/05* (22 February 2005, BiH CC); *U-7/05* (27 January 2006, BiH CC).

<sup>600</sup> *AP-2678/06* (26 May 2006, BiH CC); *Sejdić and Finci v. Bosnia and Herzegovina* (2009) 28 B.H.R.C. 201.

<sup>601</sup> These include military personnel (Annexes 1A and 1B), judiciary (Annexes 4 and 6) and other policy makers (Annex 10).

<sup>602</sup> Dayton Agreement, Annex 10.

<sup>603</sup> The changes in the High Representative's powers were authorised by the Peace Implementation Council in Bonn in December 1996. For a summary of the Bonn Conference's conclusions, see Office of the High Representative, 'PIC Bonn Conclusions: Bosnia and Herzegovina 1998: Self-Sustaining

He has used these powers extensively, especially in the early stages of the peacebuilding process and as a response to the unwillingness of the nationalist elected politicians to cooperate and make the country operational. This unprecedented presence and involvement of international officials in the country makes BiH a particularly interesting country to study because it allows us to observe at their barest the peacebuilding strategies and assumptions of the international community. While these are also present in the other two case studies, they are not as prevalent there because in South Africa the peacebuilding project is more domestically owned and in Cyprus it is still underdeveloped due to the lack of a peace agreement; it is thus BiH that presents the paradigm example of liberal peacebuilding that is being criticised here.

## **2. Cyprus**

Cyprus is an island in the Mediterranean Sea with a population of approximately 1.5 million, about 80% of whom are estimated to be Greek Cypriots (GC) and 18% Turkish Cypriots (TC).<sup>604</sup> Greek and Turkish Cypriots speak different languages and practice different religions: Greek and Christian Orthodox and Turkish and Muslim respectively. As a result of these differences, the two ethnic groups have historically had different aspirations for the future of the island. In 1955 GC started an armed struggle against the British colonial forces on the island with the objective of *enosis* (or unification) with Greece. Soon after, TC declared their preferred vision for Cyprus, that of *taskim*, or division of the island in a Greek and a Turkish part. In 1960 a compromise solution was signed between the United Kingdom, Greece and Turkey, which left Cypriots on both sides dissatisfied. It granted Cyprus its independence, prevented the two groups from uniting with their respective motherlands or dividing the island in any way and brought the two communities together under a consociational system of government. Similarly to the Dayton Agreement in BiH 35 years later, the Constitution of Cyprus provided for quotas for participation in the

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Structures', (10 December 1997) on [http://www.ohr.int/pic/default.asp?content\\_id=5182](http://www.ohr.int/pic/default.asp?content_id=5182) [accessed 6 June 2014].

<sup>604</sup> Department of Statistics and Research, 'Census of Population and Agriculture 1960 (Volume III - Demographic Characteristics)', (Nicosia: Department of Statistics and Research, 1963) at 1. The remaining 2% is made up of Maronites, Armenians and Latinos. Since 1963 and with the different birth rates between the two communities, the demographics on the island are likely to have changed.

three branches of government,<sup>605</sup> the police force,<sup>606</sup> civil service<sup>607</sup> and the army<sup>608</sup> and granted both sides a veto power for important governmental decisions.<sup>609</sup> The 1960 Constitution had never been completely operational before the events of 1963 took place.

In 1963 all TC officials left their governmental positions en masse and the community, which had been living in mixed villages and towns around the island, uprooted and organised itself in ethnically homogeneous enclaves. On the one hand, GC argue that this was a voluntary population movement, a well-organised attempt to destroy the Republic of Cyprus from within so that TC could achieve *taksim*.<sup>610</sup> On the other, TC contend that this was a desperate attempt to protect themselves from the attacks that had started taking place against their community by nationalist GC.<sup>611</sup> As a result, TC perceive this as the first instance of forced displacement on the island and the beginning of the Cyprus conflict. After 1963 and until 1974, the situation stayed tense but largely unchanging with GC remaining in control of all governmental institutions.<sup>612</sup> Then, in the summer of 1974 a group of GC right-wing paramilitaries, together with the Junta government that controlled Greece at the time, organised an unsuccessful coup d'état in order to overthrow the President and achieve *enosis*. A few days later, Turkey, claiming that it was protecting the TC, invaded Cyprus.<sup>613</sup> Around 2000 people went missing between 1963-1974, mostly during the 1974 Turkish invasion.<sup>614</sup> Turkey still militarily occupies 36% of the island, in violation of a number of UN resolutions.<sup>615</sup> Moreover, the war has resulted in a population

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<sup>605</sup> Constitution of the Republic of Cyprus, signed on 16 August 1960 (henceforth, ROC Constitution), Article 1 (for the executive), Article 62 (for the legislature) and Article 133 (for the judiciary).

<sup>606</sup> ROC Constitution, Article 130(2).

<sup>607</sup> ROC Constitution, Article 123(1).

<sup>608</sup> ROC Constitution, Article 129(1).

<sup>609</sup> ROC Constitution, Article 183(1), 49(d) and 49(f).

<sup>610</sup> Ministry of Foreign Affairs of the Republic of Cyprus, 'Historical Review', [http://www.mfa.gov.cy/mfa/mfa2006.nsf/cyprus01\\_en/cyprus01\\_en?OpenDocument](http://www.mfa.gov.cy/mfa/mfa2006.nsf/cyprus01_en/cyprus01_en?OpenDocument) [accessed 2 September 2014].

<sup>611</sup> Michális Stavrou Michael, *Resolving the Cyprus Conflict: Negotiating History* (New York: Palgrave Macmillan, 2009) at 27.

<sup>612</sup> International Crisis Group, 'The Cyprus Stalemate: What Next?', (Nicosia/Instabul: International Crisis Group, 2006) at 1.

<sup>613</sup> Ibid.

<sup>614</sup> International Crisis Group, 'Reunifying Cyprus: The Best Chance Yet', (Nicosia/Instabul/Brussels: International Crisis Group, 2008) at 8.

<sup>615</sup> UNGAR 3212 (1 November 1974); UNSCR 550 (11 May 1984).

transfer, with GC almost exclusively living in the south and TC in the north of Cyprus.

Turkey has been arguing that it was legally entitled to militarily intervene in Cyprus because of the 'Treaty of Guarantee' that was signed with the United Kingdom and Greece alongside the Constitution in 1960.<sup>616</sup> Article 2 of the Treaty allows the three countries to prohibit 'any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island' and it is this provision that Turkey relies on. However, Article 4 also provides that before the Guarantor Powers can take any action, they must consult each other, which Turkey failed to do in 1974. This disagreement about the legality of the 1974 events has led to different interpretations of the war by the two communities: GC perceive this as the beginning of the conflict that will only be resolved through a peace agreement that will remove all Turkish forces from the island, while TC consider the invasion to have ended their troubles which started in 1963 and provided them with security. As a result, they see the peace agreement as something that will mainly confirm the status quo, while potentially also returning some land back to the GC.

The major disagreements between the two ethnic groups boil down to two questions: how do we deal with the forced displacements of the 1960s and 1970s and how do we structure our political institutions in order to achieve a workable on the one hand, yet ethnically representative government on the other? Thus, the right to property, in relation to the first question and the right to vote, in relation to the second have important roles to play in the peacebuilding process in the country. Cyprus however, also shows in the clearest terms that these two rights specifically, and human rights more generally, cannot begin to express, let alone address, the conflicts that are characterising ethnically divided societies. Both sides agree that the displaced people should be remedied and there is a consensus that the right to vote should be protected. Yet, they remain divided as to which is the most appropriate way to remedy the victims and how exactly political institutions will be structured. The extent to which human rights have successfully dealt with these disagreements is examined in detail in Chapters 5, 6 and 7.

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<sup>616</sup> No. 5475 Cyprus Treaty of Guarantee signed on 16 August 1960.

Not much has happened since 1974, with the two communities staying until relatively recently physically separated by the UN buffer zone (what is known on the island as the Green Line). The Republic of Cyprus still operates according to the provisions of the 1960 Constitution, which have however, been interpreted using the doctrine of necessity in order to accommodate for the absence of TC.<sup>617</sup> There has been almost no violence between the two communities since the war and political negotiations for the resolution of the conflict are continuing until today.<sup>618</sup> One of the most significant developments to the Cypriot conflict saga took place in 1983 when the Turkish-controlled north declared its independence from the Republic and named itself the ‘Turkish Republic of Northern Cyprus’ (‘TRNC’). The ‘TRNC’ is not recognised by any other State apart from Turkey, which has led to its political and economic isolation, but it operates as a second de facto state on the island. In 2003 and on the brink of economic collapse, the ‘TRNC’ suddenly and unexpectedly opened checkpoints on the Green Line, thus allowing inter-ethnic interaction for the first time since 1963. Members of both ethnic groups visited old friends and their houses on the ‘other side’ without any violence being recorded. However, while more checkpoints have opened since then, this has not resulted in any massive changes in political or popular perceptions: the two communities continue living parallel lives, with each being mostly distrustful and fearful of the other.

The negotiations between the two sides, which have been taking place on the island for the last 40 years, have not yielded any positive results either. It was agreed in 1977, and confirmed numerous times since then, that any peace settlement will be based on a ‘bizonal, bicomunal federation’ between the two groups.<sup>619</sup> Nevertheless, disagreements as to the exact definition of this phrase have further complicated the proceedings of the negotiations.<sup>620</sup> On the one hand, GC argue that the term refers to a simple federation consisting of two communities and two territorial entities or zones; on the other, TC contend that the northern zone should always have a TC majority with any GC living there having permanently restricted property and voting rights.

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<sup>617</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others* (1964) CLR 195 (CA) (ROC Supreme Court).

<sup>618</sup> International Crisis Group, ‘Divided Cyprus: Coming to Terms on an Imperfect Reality’, (Nicosia/Instabul/Brussels: International Crisis Group, 2014).

<sup>619</sup> UNSCR 1251 (29 June 1999) at [11].

<sup>620</sup> For an excellent discussion of the Cyprus negotiations, see Michális Stavrou Michael, *Resolving the Cyprus Conflict: Negotiating History*.

The only proposal for a comprehensive settlement of the problem to be put to the vote of the public was the Annan Plan in 2004, which was however accepted by TC and overwhelmingly rejected by GC.<sup>621</sup> Since then, politicians have committed to negotiate another agreement, but progress has been slow. The recent discovery of hydrocarbons in the area had sparked hopes that a peace agreement would follow soon.<sup>622</sup> A new round of negotiations – believed by many to be the last opportunity that Cypriots will have to reunify their country – started in February 2014, but has already been put on hold due to Turkey’s illegal interferences with Cyprus’ exclusive economic zone.<sup>623</sup>

This 40-year old stagnation, tragic as it is for the inhabitants of the island, makes Cyprus an interesting case study to examine because it raises two seminal questions. The first one invites the reader to consider what contributions, if any, human rights can make to peacebuilding operations in the absence of a political agreement. The rich case law that the Cyprus conflict has given rise to (mostly at the European Court of Human Rights level) suggests that both the applicants and the judges believe that – positive – contributions can indeed be made. Nevertheless, even a cursory analysis of the European Court’s judgments and their consequences, suggests otherwise.<sup>624</sup> The second and more controversial question asks whether striking a balance between security, justice and reconciliation, and therefore building peace, necessarily has to take place *within* a *united* Cyprus. Or could it be argued instead, that peace has greater chances of success if the two ethnic groups legalise the status quo and remain separate? This question, for decades a taboo in Cyprus, has recently started receiving the attention of academics,<sup>625</sup> non-governmental organisations<sup>626</sup> and has even been hinted at by the UN Secretary-General’s Special Adviser on Cyprus.<sup>627</sup> It will

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<sup>621</sup> UN Secretary-General, 'Report of the Secretary-General on His Mission of Good Offices in Cyprus', (New York: United Nations, 28 May 2004).

<sup>622</sup> International Crisis Group, 'Aphrodite’s Gift: Can Cypriot Gas Power a New Dialogue?', (Nicosia/Instabul/Brussels: International Crisis Group, 2012).

<sup>623</sup> European Parliament, *Resolution on Turkish actions creating tensions in the exclusive economic zone of Cyprus (2014/2921(RSP))*, (Brussels: European Union, 13 November 2014).

<sup>624</sup> For a more detailed analysis of these judgments, see Chapter 5.

<sup>625</sup> James Ker-Lindsay, *Resolving Cyprus: New Approaches to Conflict Resolution* (London: I.B. Tauris & Co, 2014).

<sup>626</sup> International Crisis Group, 'Divided Cyprus: Coming to Terms on an Imperfect Reality', (Nicosia/Instabul/Brussels: International Crisis Group, 2014).

<sup>627</sup> The UN Secretary-General’s Special Adviser on Cyprus, Espen Barth Eide, warned that 'If the two sides do not agree on a solution soon, the Cyprus problem might be resolved in other ways on its own.' (Opening speech given by Espen Barth Eide at PRIO Annual Conference, 'Conflict in Europe - Europe in Conflict: The Changing Nature of Conflict in Europe and its Neighbourhood', (Nicosia, 28 November 2014)).

nevertheless not be pursued further here because both sides are, in principle at least, only committed towards negotiating a peace agreement that will reunite, rather than permanently divide, the island.

### **3. South Africa**

The third case study discussed in this thesis is South Africa (SA), which according to its 2011 census, has a population of just less than 52 million.<sup>628</sup> Of that 52 million, 80% are black (sometimes also referred to as Africans); coloured and white people make up about 9% of the population each and Asians are approximately 2%.<sup>629</sup> The main distinguishing feature between the groups is, due to SA's apartheid history, race. It has been argued that racially divided societies are different from ethnically divided ones – thus making SA an inappropriate case study – because skin colour is something that is always obvious, while ethnic characteristics such as language or religion are less apparent. However, for the insiders to the conflict, ethnic differences are as easy to identify as external characteristics; in fact, a person's accent, surname, political party or place of socialisation can be more accurate indications of her identity than her skin colour. Moreover, despite race being the main distinguishing factor between South Africans, decades of segregation have also resulted in differences in religion, language, culture and socio-economic status.

South Africa became a British colony in 1795 and acquired its dominion status in 1910. From that time onwards a series of segregationist laws were passed, which culminated in the rise of the National Party (NP) and the establishment of apartheid in 1948. During this period and until the early 1990s when apartheid started breaking down, laws were passed that included the disenfranchisement of non-whites, the segregation of all areas of life, including the provisions of education and healthcare, and the restriction of non-whites' property rights to 7% and subsequently to 13% of South African land. This resulted in a mass displacement of South Africans –

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<sup>628</sup> Statistics South Africa, 'Census 2011: Statistical Release (Revised)', (Pretoria: Statistics South Africa, 2012) at 14.

<sup>629</sup> These are referred to as 'racial', rather than 'ethnic groups' because their main distinguishing characteristics are external (such as skin colour), not internal (such as religion or language). There are also ethnic divisions in SA between different tribal groups, but these will not be examined here in any detail.



affecting approximately 1.29 million people between 1960 and 1983<sup>630</sup> – and huge socio-economic imbalances between the different racial groups. On the one hand, it was recognised in the negotiations that led to the democratisation of the country, that there was a need to address these consequences of apartheid. On the other, this had to be balanced against the competing objective of maintaining a stable economy and, as a result, interfering as little as possible with the existing property situation in the country. It is this balancing exercise that made the right to property among the most controversial provisions of the SA Constitution and the Commission on Restitution of Land Rights, which is tasked with enforcing it, one of the most important peacebuilding actors in the country.

The apartheid was strongly resisted by a number of parties, most prominently the African National Congress (ANC), which advocated the creation of a non-racial SA and the redistribution of wealth to its people. The ANC, the Pan Africanist Congress and the South African Communist Party were among the parties that were banned by the apartheid regime, with their leaders being imprisoned until just before the beginning of the democratic transition.<sup>631</sup> Such violence and gross human rights violations were not just characteristics of the apartheid regime; rather, they continued during the transitional period to democracy as well. Thus, despite the absence of a full-blown war in SA, the country is still an appropriate example of a post-conflict society. Illustrative of this is the fact that the South African Institute of Race Relations indicates that 3,706 people were killed between 1993-1994; 2,434 between 1994-95 and 1,004 between 1995-96.<sup>632</sup> During March 1994, when the first election campaign was in full swing, 537 deaths were recorded, an average of 17.3 per day.<sup>633</sup>

Change towards democracy started in SA when in 1990 the newly elected Prime Minister, F.W. de Klerk announced the lifting of the ban of the three parties and released Nelson Mandela, the leader of the ANC from prison. This marked the first irreversible commitment to a negotiated settlement, with the first negotiation round of the Convention for a Democratic South Africa (CODESA) taking place in December

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<sup>630</sup> Surplus People Project, 'Forced Removals in South Africa' (Cape Town: Surplus People Project, 1983).

<sup>631</sup> David Welsh, *The Rise and Fall of Apartheid* (Charlottesville: University of Virginia Press, 2009).

<sup>632</sup> James L. Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (Cambridge: CUP, 2003) at 18.

<sup>633</sup> Welsh, *The Rise and Fall of Apartheid* at 535.

1991 and the second in May 1992. Both rounds broke down due to the continuation of violence in the streets, which the ANC felt was orchestrated by the NP in order to undermine its negotiating potential, and because of the disagreements about how the constitutional negotiations would move forward.<sup>634</sup> The ANC insisted that only a universally elected body could draft the Constitution and that allowing the NP to stay in power while the negotiations were taking place would be unfair. On the other hand, the NP argued that it would be practically impossible and chaos would ensue if elections took place before the drafting of a Constitution. It was eventually agreed that the Multi-Party Negotiating Forum, which first met in April 1993, would draft an Interim Constitution,<sup>635</sup> this would be followed by elections and the newly elected Parliament could decide on the Final Constitution, which would have to be certified by the Constitutional Court as complying with a number of predetermined constitutional principles. The first democratic elections took place in South Africa in April 1994 and by 1996 the Final Constitution had been adopted.

The Interim Constitution provided that during the first five years of democratic government there would be a Government of National Unity. This meant that the party with most seats in the National Assembly would choose the President of the country, while every party holding at least 80 out of the 400 seats could designate an Executive Deputy President. The Cabinet members would be appointed by the President in consultation with the Executive Deputy Presidents, who had to operate with a 'consensus seeking spirit' bearing in mind 'the need for effective government.'<sup>636</sup> Since 1999 and the dissolution of the Government of National Unity, the legislature is elected through proportional representation and there are no guaranteed seats for any party in the executive. Five sets of democratic elections have taken place, all of which have resulted in the ANC acquiring more than 60% of the votes.<sup>637</sup> Moreover, the ANC controls 8 out of SA's 9 provinces, thus raising questions about the quality of democracy in the country due to the pathologies that

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<sup>634</sup> Adrian Guelke, 'South Africa: The Long View on Political Transition', *Nationalism & Ethnic Politics*, 15/3/4 (2009), 417.

<sup>635</sup> Constitution of the Republic of South Africa Act [No. 22 of 1994].

<sup>636</sup> *Ibid.*, Section 89(2).

<sup>637</sup> For the results, see the Electoral Commission of South Africa website: <http://www.elections.org.za/content/Elections/Election-reports/> [accessed 6 June 2014].

generally accompany dominant party democracies.<sup>638</sup> These include, among others, the use of public resources, the changing of the rules to distort electoral competition and the feeling among the public that there is no other viable alternative to the dominant party.<sup>639</sup> It is these challenges that democratic SA will have to face as it is moving from its childhood into adolescent years and which the right to vote is called to address. Much like the other two case studies however, questions arise about the capacity of human rights to deal with such broad political questions. Chapters 5 and 7, which examine this issue in more detail, offer a mixed answer: while the South African Constitutional Court has – very successfully – addressed these political conflicts by using the right to vote, merely inducing legal amendments rather than challenging the country’s political culture, can only make limited contributions to peacebuilding attempts.

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<sup>638</sup> Jessica Piombo and Lia Nijzink, 'Parliament and the Electoral System: How Are South Africans Being Represented?', in Jessica Piombo and Lia Nijzink (eds.), *Electoral Politics in South Africa: Assessing the First Democratic Decade* (New York, Basingstoke: Palgrave Macmillan, 2005), 64.

<sup>639</sup> Sujit Choudhry, 'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy', *Constitutional Court Review* 2 (2009), 1.